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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1993

NORMAN W. SWANSON, et al.,
Class A Petitioners,

and

CHARLES L. BERRY, et al.,
Class B Petitioners,

V.

THE STATE OF NORTH CAROLINA, et al.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

Charles H. Taylor
4295 Shattalon Drive
Winston-Salem, NC 27106
(910) 924-6064

G. Eugene Boyce*
William C. Raper
Keith W. Vaughan
Robert E. Fields III
Lawrence Pierce Egerton
Kimberly C. Stevens
WOMBLE CARLYLE SANDRIDGE & RICE
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100

***Counsel of Record**
May 23, 1994

Attorneys for Petitioners

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

30 pp

QUESTION PRESENTED

Whether North Carolina provided a clear and certain remedy to federal retirees and active duty military personnel who paid state income taxes that were illegal and unconstitutional under 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity.

PARTIES TO THE PROCEEDING

The Petitioners are: 394 named Class A Petitioner Plaintiffs and approximately 93,455 certified class members who paid state income taxes on their federal pensions; and, seven named Class B Petitioner Plaintiffs and approximately 49,479 certified class members, who are federal active duty and reserve military personnel, who paid state income taxes on their military compensation. The Respondents are: the State of North Carolina, the Secretary of the North Carolina Department of Revenue, the Department of Revenue and the Treasurer of the State of North Carolina. (A list of named Petitioners and Respondents appears in App. DD).

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In The
Supreme Court of the United States
October Term, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners, and

CHARLES L. BERRY, *et al.*,
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v.

THE STATE OF NORTH CAROLINA, *et al.*,
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Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Classes A and B, as certified by the trial court, hereby petition this Court for writ of *certiorari* to the Supreme Court of North Carolina.

OPINIONS BELOW

The trial court's opinion awarding full refunds to Plaintiffs is unpublished and appears at Appendix B. The original opinion in the Supreme Court of North Carolina is reported at 407 S.E.2d 791 (N.C. 1991) and appears at Appendix C. The opinion on rehearing is reported at 410 S.E.2d 490 (N.C. 1991) and appears at Appendix D. This Court's opinion granting *certiorari* and vacating the judgment of the Supreme Court of North Carolina is reported at 113 S. Ct. 3025 (1993). The opinion of the Supreme Court of

North Carolina on remand from this Court is reported at 441 S.E.2d 537 (N.C. 1994) and appears at Appendix A.

JURISDICTION

On remand from this Court, the Supreme Court of North Carolina issued its opinion reversing the trial court's judgment for Petitioners on March 4, 1994. (App. A). Judgment on the Supreme Court of North Carolina's opinion was entered March 24, 1994. This petition is, accordingly, filed within the time allowed by law. Supreme Court Rule 13.1. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Due Process Clause** of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .

Title **4 U.S.C. § 111** provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal services as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

North Carolina General Statute **§ 105-267**. (App. GG).

North Carolina General Statute **§ 105-266.1**. (App. GG).

STATEMENT OF THE CASE

For forty-eight years, North Carolina discriminated against federal employees in taxing their retirement benefits. By 1989, so did twenty-two other states, costing federal retirees hundreds of millions of dollars annually. In *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803 (1989), this Court held such discrimination unconstitutional. Three states subsequently afforded retroactive relief. Twenty states refused. (App. CC). This Court then granted *certiorari* in *Harper v. Virginia Dept. of Taxation*, proclaimed *Davis* retroactive and ordered "meaningful backward looking relief" which "create[s] in hindsight a nondiscriminatory scheme" absent a pre-deprivation remedy. 113 S. Ct. 2510, 2519-20 (1993). Thereafter, this Court remanded this and six other cases in light of *Harper*.[1]

After *Harper*, fifteen states dutifully gave refunds or settled their lawsuits. Five states remain, desperately clinging to the fruits of their unconstitutional actions. (App. CC). Due to the state's gamesmanship which stymied enforcement of federal constitutional rights, Georgia federal retirees sought *certiorari* in *Reich v. Collins*, 437 S.E.2d 320 (Ga. 1993), *cert. granted*, 114 S. Ct. 1048 (Ga. Feb. 22, 1994). That petition addresses various procedural tactics Georgia disingenuously terms "an adequate pre-deprivation remedy." Petitioners present the flip-side: North Carolina concedes unconstitutional taxation with no pre-deprivation remedy, but insists that an onerous post-deprivation procedural quagmire somehow constitutes even-handed "meaningful backward looking relief" which "creates in hindsight a nondiscriminatory scheme."

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[1] *Lewy v. Virginia Dept. of Taxation*, 113 S. Ct. 3024 (1993); *Swanson v. North Carolina*, 113 S. Ct. 3025 (1993); *Sheehy v. Montana Dept. of Revenue*, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, 113 S. Ct. 3025 (1993); *Norwest Bank Duluth v. McClung*, 113 S. Ct. 3026 (1993); *Duffy v. Wetzler*, 113 S. Ct. 3027 (1993); *Reich v. Collins*, 113 S. Ct. 3028 (1993).

North Carolina's exclusive "post-deprivation remedy" is N.C. Gen. Stat. § 105-267 ("Section 267"), which read in conjunction with N.C. Gen. Stat. § 105-266.1 ("Section 266.1") facially allows taxpayers to obtain refund of unconstitutional taxes sought within three years of payment.[2] Yet, as applied, these statutes scarcely resemble their language.

The court below determined that to challenge an unconstitutional tax in North Carolina, a taxpayer must, within thirty days after paying the tax, make a demand on the North Carolina Department of Revenue ("Department"), wait ninety days for the preordained denial (the Department is prohibited from deciding constitutional issues, thus requiring denial of the demand[3]), and then, and *only* then, file a lawsuit against the state. (App. A, pp. 9-10). Class demands are prohibited. Each class member must individually comply with Section 267. (App. A, pp. 8-9).[4] Justice Mitchell in dissent decried the majority's holding as "an unseemly result," and declared Section 267, as applied, "a sham procedure . . . futile from the outset in this case," which "tilt[ed] the scales too far in favor of the taxing entity and den[ied] these taxpayers fundamental due process." (App. A, p. 25).

But the story gets worse. The Department sent each Petitioner tax instructions for 1985 through 1988, stating that taxpayers had three years -- not thirty days -- to request refunds. (App. L).

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[2]Section 267 can be read only to (1) require payment before contesting a tax; (2) acknowledge that payment of the tax is without prejudice; and (3) provide means for obtaining a refund without litigation.

[3]*Coca-Cola v. Coble*, 238 S.E.2d 780, 782-83 (N.C. 1977). This case also held Section 266.1 inapplicable to overpayments due to an unconstitutional tax. Therefore, taxpayers who overpay because of inadvertence or agency misinterpretations are afforded broader relief than those taxed unconstitutionally.

[4]*See also Bailey v. State*, 412 S.E.2d 295, 301 (N.C. 1991) ("[A]lthough N.C.G.S. § 105-267 does not expressly prohibit taxpayers from seeking refunds as a class, it includes no provision for a tax refund demand to be made either by taxpayers as a class or as represented by others").

Through tax year 1993, the tax instructions remain unchanged. (App. N). The Department also printed tax bulletins for 1985 through 1988 repeating that refunds were available for three years after filing and again omitting the thirty-day demand rule. (App. M). The result: taxpayers were *affirmatively misled.*[5]

Significantly, the state did not use refund demands as a tool for fiscal planning. Information obtained from such demands was not maintained, much less provided to legislative officials for consideration in the budget process. (App. W, p. 191). Thus, as applied, the demand rule only functioned to limit refund of wrongfully imposed taxes to diligent students of the law who were extremely persistent in their efforts to recover sums often exceeded by litigation costs.[6]

The Department's inconsistent conduct after *Davis* created confusion and further restricted access to post-deprivation relief. Department officials told some taxpayers to pay immediately or face "heavy penalties," some to "do nothing," and some to file an amended return. None were told about a thirty-day demand rule. (App. Y, pp. 214-16, 221-23; App. X).

On April 10, 1989, the Attorney General advised the Department that taxpayers seeking refunds must comply with the thirty-day demand rule *and* that taxpayers did not have to pay the unconstitutional taxes. (App. O, pp. 158-59). This opinion contained no specific form or content requirements for refund demands, but advised that a statement challenging the tax and

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[5]Judge Howard, United States District Judge for the Eastern District of North Carolina, noted, in a companion federal action: "[Section 267] is uncertain because of the conduct of . . . the Department. . . . All interpretation and explanation of these statutes provided to taxpayers by the defendants indicated that *any* request for refund may be made within three years of payment." (App. G, p. 72) (emphasis in original).

[6]In South Carolina, counsel estimated that individually litigating each refund claim would have cost more than $38 million in filing fees alone. (App. AA).

demanding a refund would suffice. (App. O, p. 159). On April 13, 1989, Respondents announced in a single press release of unknown circulation, just four days before the 1988 tax filing deadline, that demands for refund of unconstitutional taxes had to be made within thirty days after payment *and omitted* the Attorney General's advice that such tax need not be paid in the first place. (App. P, p. 160). Many Petitioners had already paid their taxes more than thirty days before the newly announced requirements.[7] Still others paid afterward, unaware they did not need to pay.

Although they decided to begin enforcing Section 267 (having previously been unaware that it was the exclusive means for contesting an unconstitutional tax[8]), Department officials could not accurately determine the date from which the thirty-day period was measured,[9] they did not know what constituted a sufficient demand

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[7]The Secretary of Revenue stated: "For those federal retirees who filed their returns early . . ., none of them anticipated the Supreme Court decision by filing timely claims for refund, and of course . . . it was too late to do so. It is, understandably, these taxpayers who have been the most upset . . . ." (App. T).

[8]The Secretary of Revenue for the tax years in question testified she first learned of Section 267 "when this case [*Swanson*] came up." (App. V, pp. 188-89). The Assistant Director of Compliance Examination Programs testified he was not aware of the thirty-day rule as of *Davis*. He learned of Section 267 from the Attorney General's advice on the effect of *Davis*. (App. V, pp. 182-83). The Administrative Officer in the Individual Income Tax Division testified that while he was aware of Section 267, it had never been used before *Davis* nor had he advised anyone about a demand rule. (App. V, pp. 184-85).

[9]Judge Howard found: "A further complication is that the defendants cannot administer the 30-day rule. The defendants do not date-stamp returns filed prior to the deadline. The defendants assume that the date the return is signed is the date of payment, regardless of when the return was filed. Therefore, those plaintiffs filing their returns more than 30 days after signing the returns never had the opportunity to file a claim." (App. G, p. 72). Department officials testified "the date [a return is received] is not significant to the department." (App. V, pp. 184, 186-87). Also, Section 267 allows differing interpretations as to when "payment" occurs, the critical event identifying when demand is due. Literally, the statute could require separate "demands" after each tax withholding.

letter,[10] and they were not internally equipped to respond to such demands within ninety days. Even after adopting various policies regarding the thirty-day demand rule, the Department did not provide refunds to all the people who just happened to comply with the newly adopted "rules."[11]

Following *Davis*, Petitioners filed two lawsuits. They first filed in federal court, seeking *inter alia*, injunctive and declaratory relief and damages under 42 U.S.C. § 1983. *Swanson v. Powers*, No. 89-282-CIV-5-H (E.D.N.C. 1990), *rev'd in part*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992).[12] Class B Petitioners later joined as additional plaintiffs.[13] Immediately after

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Alternatively, "payment" could occur the date the tax is due. Other constructions are possible. Not only did the Department and the courts fail to provide guidance on this key date, but also the Department only adopted an internal policy after *Davis*. (App. W, p. 193).

[10]The Secretary of Revenue was asked if she understood the requirements for a demand letter after the Attorney General's April 10, 1989 opinion, and stated "[n]o, sir. I did not." (App. V, p. 189).

[11]Some Petitioners demanded refunds within thirty days of payment but received neither response nor refunds from the Department within ninety days. For example, Mr. Roe filed his amended return on February 28, 1989 and received no response denying his refund until September 13. (App. Y, pp. 201-05). Mr. Wagner filed his return on April 10, 1989, and filed his amended return on April 29 demanding a refund; on October 10, the Department wrongfully denied his claim. (App. Y, pp. 208-09). Mr. Loudermilk paid his taxes on April 1, 1989, filed his amended return April 8, and was wrongfully denied a refund on September 28. (App. Y, pp. 210-13).

[12]After that suit was filed, the North Carolina legislature, on August 12, 1989, purported to abolish the discriminatory tax scheme as to Class A Petitioners for tax year 1989. N.C. Sess. Laws 1989 (Reg. Sess. 1989) ch. 792. (App. BB, p. 237).

[13]Class B Petitioners are federal active duty and reserve military personnel who did not receive a $1,500 tax exemption given National Guardsmen. *Barker v. Kansas*, 112 S. Ct. 1619 (1992) held military personnel are within the ambit of 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. After Class

the federal suit began, the district court issued a conditional order certifying the original class (now Class A) to make such demand as "may be required to obtain income tax refunds . . . ." (App. F, p. 63). Class demands were made. (App. K, pp. 95-104).

Faced with the demands, and lacking an established procedure for considering them, the Department imposed new requirements as to the form and content of the demands which appeared nowhere in the statute or administrative code. (App. I, p. 90). These requirements were completely unnecessary to consider Petitioners' demands[14] (which, of course, the Department had to deny anyway). After a lengthy wait, the Department refused to honor not only Petitioners' claims for 1985 through 1987 taxes, but also Petitioners' "timely-filed" class refund claims for 1988 taxes unlawfully exacted after *Davis*. (App. I).

After both classes were certified for all purposes, Respondents moved to dismiss the federal lawsuit under the Tax Injunction Act and principles of comity. Following substantial discovery establishing the Department's inability to administer Section 267,

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B was added, the legislature repealed the exemption for National Guardsmen for tax year 1990. N.C. Sess. Laws 1989 (Reg. Sess. 1990) ch. 1002 (entitled "An Act to Conform the Laws of North Carolina to the Requirements of Certain Federal Laws and Constitutional Principles"). (App. BB, p. 236).

[14]The Administrative Officer in the Individual Income Tax Division of the Department testified that, "it was not a requirement to have all the figures . . . in the letter or to even include their Social Security number. As long as we could identify the taxpayer and they were requesting that refund of taxes paid, then we would consider that a claim." (App. V, p. 186). Furthermore, as early as April 26, 1989, Respondents obtained from the federal government, as to civilian federal retirees most, if not all, of the information sought by these "surprise regulations." (App. V, p. 183; App. R). The federal government also made available to all states data on United States military personnel pay records, including retired personnel. North Carolina failed to obtain such information. (App. R, p. 171-72). Respondents, thus, had no need for any of the information required of Petitioners. Everything required but the taxpayer's name was superfluous, and the names of federal retirees were readily available from the federal government.

the district court made appropriate factual findings, held that Section 267 *as applied* was not a plain, speedy, efficient, clear, certain, adequate or complete remedy, and denied the motion to dismiss. (App. G, pp. 71-74, 78). The State did not appeal these findings.[15]

Petitioners also filed in state court for refund of 1985 through 1988 taxes for Class A and 1986 through 1989 taxes for Class B. The trial court conditionally certified the classes for the purpose of making refund demands. (App. E, pp. 55-56). These class demands were made and rejected. (App. K, p. 105-09; App. I, p. 91-92). Thereafter, the trial court certified both classes for all purposes. (App. E, pp. 57-61). The trial court later entered summary judgment for both classes, ordering refunds with interest. (App. B). Respondents appealed. The North Carolina Supreme Court reversed, holding that *Davis* was not retroactive, and remanded the case to the trial court for dismissal. (App. C). On rehearing, state law claims which were addressed neither by the trial court nor in the previous opinion were also ordered dismissed. 410 S.E.2d 490 (N.C. 1991). (App. D). Petitioners sought *certiorari* from this Court on March 4, 1992. On June 28, 1993, this Court granted *certiorari*, vacated the decision of the state court and remanded for reconsideration in light of *Harper*.[16]

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[15]The State did recently ask the federal court to reconsider its ruling. The court received briefs, heard oral arguments, and again denied the State's motion to dismiss on these grounds. (App. H, pp. 81-82). The federal court nonetheless dismissed the retirees' federal action, finding itself collaterally estopped by the state court's decision. (App. H, p. 83, 88). A motion for reconsideration has been filed.

[16]Petitioners filed, in their state court complaint, claims for relief for violations of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, 4 U.S.C. § 111, and the doctrine of intergovernmental tax immunity. (App. EE). Both in the initial brief in the North Carolina Supreme Court and the brief on remand from this Court, Petitioners raised and argued the federal constitutional claims which are presented to this Court.

On remand, a majority of the North Carolina Supreme Court found Petitioners' refund claims barred by Section 267's thirty-day demand rule. The majority spoke directly only to the facial validity of Section 267. It ignored without comment Petitioners' arguments that, *as applied* here, the statute is unconstitutional (and also ignored similar conclusions by Justices Mitchell and Parker in dissent). It acknowledged, but refused to apply, the federal court's earlier rulings and, even more startlingly, did not address the merits of the factual determinations by the federal court.[17]

The result is *no* remedy for over 90,000 federal retirees and almost 50,000 federal active duty and reserve military personnel without explanation as to how the "demand and wait" rule provides the "plain, speedy, efficient, clear, certain and adequate" remedy the federal court found lacking and is anything other than a "sham procedure . . . futile from the outset" (App. A, p. 25) which has allowed the state to "pick [its] taxpayer[s'] pocket[s]" and keep "the money when it [was] caught doing so." (App. C, p. 47).

REASONS FOR GRANTING THE PETITION

This case raises a question of substantial public importance concerning taxes collected in violation of the Constitution and statutes of the United States. In the wake of *Harper* and this Court's prior remand of this case, efforts to deny relief under constitutionally deficient state remedies and burdens imposed upon federal rights are at the forefront of certain states' continuing refusal to recognize this Court's decisions as the "controlling statement of federal law." *Harper*, 113 S. Ct. at 2515.

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[17]Both in the initial brief in the North Carolina Supreme Court and the brief on remand from this Court, Petitioners argued that the court below was bound, under the doctrine of collateral estoppel, by the prior federal district court order lifting the jurisdictional bar of the Tax Injunction Act.

This Court went to great lengths in such cases as *Davis*, *Harper* and *McKesson*[18] to establish clearly a taxpayer's right to freedom from discriminatory taxation. Yet, five states are, thus far, testing this Court's resolve by employing state procedural obstacles to deny relief to affected taxpayers. With hundreds of millions of dollars at stake in each state, any procedural scheme that ultimately avoids *Harper's* mandate will become the model for other states. This potential result has far-reaching consequences that eclipse the impact on Petitioners and federal retirees generally. The mandates of *Davis* and *Harper* are not limited to federal retirees. Likewise, state tax refund remedies -- particularly exclusive post-deprivation remedies -- must create incentives for constitutionally sound tax laws. Otherwise, taxpayers are, for practical purposes, limited to prospective relief when a tax is ruled unconstitutional, notwithstanding *Harper's* retroactivity mandate. As a corollary, states retain the hundreds of millions of dollars unconstitutionally collected before and during the litigation challenging the tax.

In a related case from Georgia (*Reich v. Collins*, 437 S.E.2d 320 (Ga. 1993), *cert. granted*, 114 S. Ct. 1048 (Ga. Feb. 22, 1994)), this Court is reviewing the adequacy of a *pre-deprivation* remedy and will articulate such standards as it deems important in that context. The present case affords a similar opportunity with respect to *post-deprivation* relief. Ironically, this Court's ruling, in *Reich*, addressing the favored remedy, will have little effect if North Carolina's post-deprivation scheme is not also addressed. Indeed, a state would be foolish to provide any pre-deprivation remedy if North Carolina's experience is viewed as acceptable relief. *Taken together*, *Reich* and this case offer this Court an opportunity to fully address the constitutional requirements for state pre-deprivation *and post-deprivation* remedies when confronted with unconstitutional taxes.

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[18] *McKesson v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990).

The competing state and federal interests presented are clear. The state interest lies in orderly regulation of its budget and fiscal policies.[19] The federal interest lies in enforcing the Constitution and acts of Congress prohibiting discriminatory taxes. The extent to which a state non-discriminatorily taxes its citizens and how it spends money is a political decision left to state government. On the other hand, whether each individual's property rights are preserved against illegal taking through due process of law is a federal matter, controlled by this Court's unbiased interpretation of constitutional principles and federal law.

A federal district court held North Carolina's remedial scheme so inadequate that the extreme deference to states in the tax area did not outweigh the federal interests at issue. Yet, in contravention of principles of federalism, the court below evaded the federal district court order by applying state rather than federal preclusion law and then totally ignored the merits of the issues addressed in the order. Only this Court can uphold the sanctity of the federal court's order and, more importantly, uphold the sanctity of this Court's own mandates in *Davis*, *Harper* and *McKesson*.

Petitioners respectfully submit that North Carolina's application of its post-deprivation remedy should not become the model for others; that North Carolina should not be the lone state which escapes this Court's rulings in *Davis* and *Harper*; and that granting *certiorari* in this case will allow this Court to ensure that state

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[19]Respondents claim that the financial impact on the state of ruling in Petitioners' favor justifies the demand rule, as applied. If, to any extent whatever, such financial impact may be an issue, the facts should be considered in their entirety. Petitioners' entire annual claim is estimated at less than four-tenths of one percent of the state's annual budget. Recently, North Carolina's Governor announced a "surplus of nearly a billion dollars." (App. Z, p. 233-34). In 1992 alone, just one federal agency (the Department of Defense) spent over six billion dollars on non-pay purchases in North Carolina. (App. Z, p. 231). In 1989 alone, the federal payroll in North Carolina was over three billion dollars. (App. Z, p. 232). In 1989, the federal government made contracts with North Carolina businesses in excess of one billion dollars. (App. Z, p. 232).

remedies are applied to encourage constitutional taxation, federal orders are respected and this Court's mandates remain the law of the land.

1. North Carolina's exclusive post-deprivation tax refund statute denies federal retirees and active duty military personnel a clear and certain remedy. Due Process requires notice and an opportunity to be heard *before* a citizen is deprived of property. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951).[20] While certain exceptions are recognized based upon exigent circumstances or in balancing other governmental interests, this Court still requires post-deprivation procedural safeguards in order to protect citizens from unconstitutional takings. *McKesson*, 496 U.S. at 36.[21]

In the context of state taxation with no pre-deprivation remedy, as in North Carolina, such procedural safeguards must provide not only "a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy." *McKesson*, 496 U.S. at 39.[22] When the tax is unlawfully discriminatory, a post-deprivation remedy must accord taxpayers

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[20]"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner . . . .'" *McKesson*, 496 U.S. at 39 n.22 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Yet, the court below held that Petitioners were not entitled to a hearing, even *after* their property was unconstitutionally taken, due to Petitioners' failure to comply with the dictates of Section 267.

[21]*See* for example *North Georgia Finishing Co. v. Di-Chem*, 419 U.S. 601 (1975) (delineating procedural due process requirements where a state fails to give a debtor a hearing before attachment or garnishment of his property).

[22]*See also Atchison, Topeka & Santa Fe Railway Co. v. O'Connor*, 223 U.S. 280, 285 (1912) ("It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy").

"meaningful backward-looking relief to rectify any unconstitutional deprivation. . . . In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some order that create[s] in hindsight a nondiscriminatory scheme." *Harper*, 113 S. Ct. at 2519-20 (citations and internal quotations omitted).

Under the holding below, the only "remedy" available to Petitioners who paid the discriminatory taxes under "constitutionally significant duress"[23] is Section 267. As applied here, however, Section 267 amounts to no remedy at all because of (1) North Carolina's futile "demand and wait" procedural bar to relief under this statute,[24] (2) affirmatively misleading instructions provided by the Department which failed to apprise Petitioners that this statute was their exclusive remedy and identified three years as the only temporal restriction upon access to refunds, (3) the

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[23]"[W]hen a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under `duress' in the sense that the state has not provided a fair and meaningful predeprivation procedure." *McKesson*, 496 U.S. at 39 n.21. In North Carolina, an attempt to evade payment of income tax is a Class I felony with a possible sentence of 5 years and/or a $25,000.00 fine. N.C. Gen. Stat. §§ 105-236(7), 14-1.1(a)(9). In addition, penalties include 10% for failure to pay income tax, 10% or 25% for negligence, and 25% if fraud is involved. N.C. Gen. Stat. § 105-236(4), (5) and (6). Unpaid taxes bear interest at a rate, as determined by the Secretary of Revenue, between 5% and 16%. N.C. Gen. Stat. § 105-241.1. Unpaid assessed taxes are subject to execution upon real and personal property and garnishment of wages and income. N.C. Gen. Stat. § 105-242. The Secretary may bring a civil action to collect taxes at any time. N.C. Gen. Stat. § 105-239. To contest an assessment in the judicial branch, other statutes require payment of the tax or a bond. N.C. Gen. Stat. § 105-241.3. Any suit by the taxpayer must then be brought pursuant to Section 267. Thus, in North Carolina, taxes are paid under "constitutionally significant duress." *See Harper*, 113 S. Ct. at 2520 n.10 (citations omitted).

[24]Section 267 does not contain a "short statute of limitations," a "protest" requirement or a "timely notice" provision for the purpose of fiscal planning as referred to in *McKesson*, 496 U.S. at 45. The effect of Section 267's futile administrative review procedure, especially given the required ninety-day wait, far exceeds both the purposes and effects of the provisions envisioned by *McKesson*.

interpretation of Section 267 as the exclusive remedy available to Petitioners, despite express statutory language providing an alternative, (4) the rejection of class demands, thus requiring each taxpayer to individually run the maze of misleading information and comply fully with all "details" of the futile "demand and wait" rule, (5) the application of previously unannounced administrative barriers to Petitioners' efforts to comply with Section 267's procedural aspects, and (6) North Carolina's *de facto* denial of retroactive effect to *Davis* despite *Harper*. Individually, and especially in combination, these deficiencies preclude the relief mandated by this Court.

The fundamental error by the majority below was its confusion of some theoretical remedy with a "clear and certain" remedy sufficiently swift and accessible to require return of unlawfully taken property as early as practicable.[25] North Carolina could have provided such a remedy to Petitioners by empowering the Department to promptly conduct hearings and provide refunds to taxpayers challenging the constitutionality of the state's tax laws.[26] Perhaps, North Carolina could have provided such a remedy by providing taxpayers early and direct access to its courts. North Carolina might even have provided such a remedy by allowing access to its courts conditioned only upon some sort of notice designed to allow its agencies and legislature to plan for potential adverse outcomes. *McKesson*, 496 U.S. at 44-45. What it could not do was impose limitations upon taxpayer remedies which functioned merely to discourage the pursuit of refund claims and make obtaining relief difficult or unlikely.

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[25]*See McKesson*, 496 U.S. at 36 n.17 and cases cited therein.

[26]*See Bob Jones University v. Simon*, 416 U.S. 725, 746 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931); *Dodge v. Osborn*, 240 U.S. 118 (1916).

Neither the "demand" nor the "wait" served any useful purpose, except to block access to the courts. This *futile* procedural bar to suit became even more unreasonable when interpreted to require that each individual taxpayer comply with all announced and unannounced regulations. Taxpayers are not required to resort to futile procedures to obtain relief from unconstitutional taxation. Such procedures violate the Due Process Clause. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499 (1928).[27]

Justices Mitchell and Parker, in dissent below, recognized the inherent futility here: "[T]he opinion of the majority in the present case goes well beyond any legitimate need supporting [fiscal] concerns and upholds a sham procedure for postdeprivation relief which was futile from the outset in this case. Surely, this unseemly result may only be properly characterized as tilting the scales too far in favor of the taxing entity and denying these taxpayers fundamental due process." (App. A, p. 25).

Even worse, Petitioners were continually assured by the Department that they had three years to request a tax refund. Such pronouncements are no surprise since senior Department officials were unaware of any shorter time requirement before *Davis*.

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[27]In *Montana*, this Court held: "Finally, it is urged that plaintiff in error may not maintain this action because of its failure to apply to the county board of equalization for an administrative remedy. We do not stop to inquire whether under any circumstances such remedy was open to the taxpayer, for the short answer is that the decision of the Supreme Court of Montana in the Rogers Case would have rendered any such application utterly futile since the county board of equalization was powerless to grant any appropriate relief in the face of that conclusive decision." 276 U.S. at 515. Likewise, the Supreme Court of North Carolina's decision in *Coca-Cola* rendered any demand for refund to the Department utterly futile since that department is powerless to grant Petitioners appropriate relief.

Nonetheless, to permit the Department to reverse course[28] and bar refund claims based on failure to comply with the uncharted waters of Section 267's "demand and wait" rule, despite the Department's affirmative representations that Petitioners had three years to seek refunds, also violates the Due Process Clause. A state cannot punish an individual who, in good faith,[29] relies upon interpretation of the law by those officials responsible for its administration. *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965); *Raley v. Ohio*, 360 U.S. 423 (1959).[30]

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[28]"[A]brupt changes in discretionary agency practice or interpretation require some degree of notice, if possible, when the change threatens to penalize parties for reasonable reliance on the prior practice." *Eastern Carolinas Broadcasting Co. v. Federal Communications Commission*, 762 F.2d 95, 101 (D.C. Cir. 1985). *See also Boston Edison Co. v. Federal Power Commission*, 557 F.2d 845. 846 (D.C. Cir. 1977) ("Although an administrative agency is not bound to rigid adherence to its precedents, it is equally essential that when it decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect").

[29]In fact, this Court presumes that the violation of law was caused by the erroneous advice of the officials. *Raley v. Ohio*, 360 U.S. 423, 439 (1959).

[30]*See also United States v. Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674 (1973) ("traditional notions of fairness inherent in our system of criminal justice" prevent the government with proceeding with a prosecution under a statute when the defendant reasonably relied on regulations issued under authority of the statute permitting performance of the charged acts); *United States v. Clegg*, 846 F.2d 1221, 1223 (9th Cir. 1988) (good faith reasonable reliance on the apparent authority of government officials is a defense); *United States v. Durrani*, 835 F.2d 410, 422 (2nd Cir. 1987) (legitimate reliance on an official interpretation of the law is a defense); *United States v. Rosenthal*, 793 F.2d 1214, 1235 (11th Cir.) (legitimate reliance on an official interpretation of the law is a defense), *modified on other grounds*, 801 F.2d 378 (11th Cir.), *cert. denied*, 480 U.S. 919 (1987); *United States v. Duggan*, 743 F.2d 59, 83 (2nd Cir. 1984) (although there are few exceptions to the rule that ignorance of the law is no excuse, there "is an exception for legitimate reliance on official interpretation of the law").

This due process violation is exacerbated when review of the statutory scheme fails to reveal the exclusivity of such procedural requirements. A plain reading of North Carolina's tax scheme does not even suggest that Section 267 is the exclusive remedy for unconstitutional taxation. Section 266.1 provides that "[a]ny taxpayer may apply . . . for refund of tax . . . paid by him at any time within three years after the date set by the statute for the filing of the return . . . ." Section 266.1(e) provides that "the rights granted by this section are *in addition* to the rights provided by G.S. 105-267" (emphasis added). (App. GG). *See Kirkpatrick v. Currie*, 108 S.E.2d 209 (N.C. 1959) (Sections 266.1 and 267 provide *alternative mechanisms* to obtain a tax refund). A "clear and certain" remedy can hardly be grounded on the expectation that taxpayers will assume error in Department publications which specify the period for seeking refunds, especially when the publications are consistent with the language of the tax statutes themselves.

North Carolina's use of Section 267 to require individual demands as a predicate for a class action magnifies the injustice inherent in its use of the statute to bar Petitioners' claims. Requiring more than 140,000 taxpayers to separately jump through all of the state's meaningless hoops in each of the four years in question in order to protect their *federal* rights is nonsense. Even if the state used the demand rule as a fiscal planning tool (which it did not), how can a "class demand" pursuant to court order on behalf of 140,000 taxpayers not suffice to put the state on notice? Would North Carolina seriously have preferred to "administer" 140,000 claims annually, especially given the Department's state of preparedness? The "individual demand" should be recognized for what it is -- the ultimate guarantee that the state will keep all that it wants of what it wrongfully took.

The Department's imposition of previously unpublished form and content requirements *after* receiving Petitioners' class demands changed the rules once the game was over. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 682 (1930) ("Whether acting through its judiciary or through its legislature, a state may

not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it"). In sanctioning this conduct, the court below elevated form over substance to a degree not contemplated by *McKesson* and in direct contravention of *Brinkerhoff*. *See also Londoner v. Denver*, 28 S. Ct. 708, 714 (1908) ("In the assessment, apportionment, and collection of taxes upon property within their jurisdiction, the Constitution of the United States imposes few restrictions upon the states. In the enforcement of such restrictions as the Constitution does impose, this court has regarded substance, and not form").[31]

The court below also applied Section 267 to retroactively bar Petitioners from seeking relief. This Court has plainly held that "[w]hatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law . . . cannot extend to their interpretations of federal law." *Harper*, 113 S. Ct. at 2519. The court below deprived Petitioners of the benefit of this Court's retroactivity holding in *Harper* by requiring Petitioners to complain, as early as 1986 and *before* a right to relief was clearly established by this Court in *Davis*.[32] Because Petitioners did not foresee, during tax years 1985 through 1987, this Court's *Davis* decision (an event which Respondents successfully argued in the

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[31]In *Londoner*, this Court further stated: "If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal . . . . It is apparent that such a hearing was denied to the plaintiffs in error." *Id.* at 714. North Carolina likewise denied Petitioners *any* hearing.

[32]Even had Petitioners complained within thirty days of paying unconstitutional taxes in 1985 through 1987 (before *Davis*), Petitioners would have received no relief from the Department. (App. T; App. V, pp. 187-88).

Fourth Circuit Court of Appeals that they could not have foreseen[33]), and despite this Court's mandate to apply *Davis* retroactively, the state court below slammed shut the door to its courthouse.

All of this confusion and inequity occurs in North Carolina only when a taxpayer challenges a tax as unconstitutional or illegal. North Carolina provides clear, and more favorable, remedies to taxpayers who mistakenly pay too much tax or who complain about administrative interpretations of North Carolina's tax laws.[34] If Petitioners had made mistakes in calculating their taxes or were over-taxed because of bureaucratic misinterpretation of North Carolina's tax laws, refunds would have been available. (App. GG). Such a scheme discriminates against a federal right.[35]

The North Carolina Supreme Court's application of Section 267's "demand and wait" rule did *not* afford Petitioners the clear, certain and meaningful remedy guaranteed by due process. *Harper* is clear. Respondents must cure their discrimination by (1) taxing the state retirees retroactively, or (2) giving Petitioners full refunds. *See Harper*, 113 S. Ct. at 2519-20.[36] Despite the twin mandates of

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[33]*Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992). *See also Bailey v. State*, 412 S.E.2d 295, 305 (N.C. 1991) ("We will not hold public officials of this state to more perfect knowledge of the law than is apparent in appellate court reports").

[34]*Coca-Cola v. Coble*, 238 S.E.2d 780, 782-83 (N.C. 1977); *Kirkpatrick v. Currie*, 108 S.E.2d 209 (N.C. 1959).

[35]*See Felder v. Casey*, 487 U.S. 131, 141-42 (1988); *Pickett v. Brown*, 462 U.S. 1 (1983); *Hillsborough v. Cromwell*, 326 U.S. 620 (1946); *Republic Pictures Corporation v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam*, 327 U.S. 757 (1946); *McKnett v. St. Louis & S. F. Railway Co.*, 292 U.S. 230, 234 (1934).

[36]*See also Hagge v. Iowa Dept. of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993); *Brumley v. Utah State Tax Commission*, 868 P.2d 796 (Utah 1993, amended January 13, 1994); *Strelecki v. Oklahoma Tax Commission*, 1993 WL 379008, ___ P.2d ___ (Okla. 1993), *opinion on reh'g*, 1994 WL 102224 (Okla.

Harper and *McKesson*, Respondents neither provided full refunds to Petitioners[37] nor imposed a retrospective tax on state retirees. They instead established a procedural morass as a futile condition precedent to Petitioners' lawsuit, labelled it an exclusive "post-deprivation *remedy*," waited ninety days, and denied Petitioners' claim.

The conduct described herein is sanctioned by the very same state supreme court which recently subscribed to the proposition that:

> A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement nor is susceptible of impairment by legislation. And where the Constitution points out no remedy and *no statute affords an adequate remedy under a particular fact situation*, the common law will furnish the appropriate action for adequate redress of such grievance.

Corum v. University of N.C., 413 S.E.2d 276, 289, *cert. denied*, 113 S. Ct. 493 (N.C. 1992) (emphasis added).

1994); *In re Hawaiian Flour Mills, Inc.*, 868 P.2d 419 (Hawaii 1994); *Marx v. Broom*, 632 So.2d 1315, 1994 WL 52850 (Miss. 1994); *Cambridge State Bank v. James*, ___ N.W.2d ___, 1994 WL 106516 (Minn. 1994).

[37]Respondents oft-point to a small fraction of taxpayers receiving refunds for tax year 1988 alone to suggest that relief was available had Petitioners simply followed the "rules." However, that the Department, post-*Davis*, applied Section 267 in a manner which severely and arbitrarily restricted relief (as opposed to blatantly denying relief to all) neither excuses nor erases Respondents' failure to create in hindsight a nondiscriminatory tax scheme. Given the court below's view of the Department's power respecting constitutional issues, the source of the authority to provide this small number of refunds remains a mystery. Even so, demands for refunds prior to *Davis* were not honored. (App. V, p. 187-88).

For all practical purposes, North Carolina blocked retroactive application of *Davis*. Allowing this result to stand converts *dicta* of *McKesson* from guidance on protecting legitimate state interests in sound fiscal planning into a primer on enacting unconstitutional taxes with impunity. Granting *certiorari* will allow this Court to prevent distortion of *McKesson*, to remedy North Carolina's conceded violation of Petitioners' freedom from discriminatory taxation, to correct the additional denial of due process to Petitioners caused by North Carolina's refusal to provide meaningful backward-looking relief, and to ensure that other states fully comply with *Davis*, *Harper* and *McKesson*.

2. In failing to give preclusive effect to a prior federal district court order, the court below violated principles of federalism and supplanted federal preclusion law with its own definition of collateral estoppel. Fundamental to relations between state and federal courts is mutual respect for the judgments of one another. Such respect is essential to the fair and efficient functioning of our system of justice. Failure by a state court to accord proper preclusive effect to a prior federal court judgment violates well-established principles of federalism. *Watkins v. Resorts Intern. Hotel & Casino*, 591 A.2d 592 (N.J. 1991). This Court accordingly has long held that it has jurisdiction to review state decisions dealing with the preclusive effect of federal judgments.[38] "[W]hether a Federal judgment has been given due force and effect in the state court is a Federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise." *Deposit Bank v. Frankfort*, 191 U.S 499, 514-15 (1903).

Whatever freedom state courts may enjoy to define their own law of *res judicata* and collateral estoppel, such freedom does not

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[38]*Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U.S. 141, 146 (1887); *Myers v. International Trust Co.*, 263 U.S. 64, 69 (1923); *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986).

include defining the preclusive effect of a federal court order. Federal law applies to this determination, even in state courts. *Blonder Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 324 n.12 (1971).

Nonetheless, after a glancing review of its state law, the court below refused preclusive effect to a prior federal order issued in the companion federal case. (App. A, pp. 20-21). That order found Section 267 was not plain, speedy, efficient, clear, certain, adequate or complete. (App. G, pp. 71-72, 74). Because the federal district court previously stated that "final judgment has not been issued in this case and . . . this court has never ordered that this case be closed," the state court below found the "finality" element of collateral estoppel lacking. (App. A, p. 21). Thus, the court held that *final judgment on the merits* in applying the doctrines of both *res judicata* and collateral estoppel is required before a federal court decision will be accorded preclusive effect in North Carolina. *Id.*

Under federal law, "finality" for purposes of issue preclusion is more flexible than for purposes of appeal or for *res judicata*. *Dyndul v. Dyndul*, 620 F.2d 409, 412 (3rd Cir. 1980); *Miller Brewing Co. v. Joseph Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979). The federal definition of "finality," applied by the vast majority of Circuit Courts of Appeal addressing the issue, is:

> Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291 [final decision on the merits], ought nevertheless be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (*i.e.*, that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. "Finality" in the context here relevant may mean little more than that the litigation of a particular issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again.

O'Reilly v. Malon, 747 F.2d 820, 823 (1st Cir. 1984).[39] In the present case, the federal order was entered after extensive argument[40] by both parties, was not avowedly tentative, and was appealable.[41] Thus, the order was "sufficiently firm" to be "final" under federal collateral estoppel law. The court below therefore erred in failing to apply the proper law.

Because the federal court found Section 267 neither plain, speedy and efficient for purposes of the Tax Injunction Act, 28 U.S.C. § 1341, nor clear, adequate and complete for purposes of comity, Section 267 necessarily is not clear and certain for purposes of federal due process and can *never* satisfy due process standards.[42] The common denominator between the Tax Injunction Act and the

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[39]*See also Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89 (2nd Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *Dyndul v. Dyndul*, 620 F.2d 409, 412 (3rd Cir. 1980); *Swentek v. USAir, Inc.*, 830 F.2d 552, 561 (4th Cir. 1987); *Employees Own Federal Credit Union v. City of Defiance, Ohio*, 752 F.2d 243, 245 (6th Cir. 1985); *Gilldorn Sav. Ass'n v. Commerce Sav. Ass'n*, 804 F.2d 390, 394 (7th Cir. 1986); *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 563-64 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991); *Luben Industries, Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983); *Block v. U.S. International Trade Commission*, 777 F.2d 1568, 1572 (Fed. Cir. 1985); *contra, Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1271 n.7 (5th Cir. 1986).

[40]In concluding that the matter was "ripe for ruling," the federal court observed that "the parties have extensively briefed the issues" and "the court has conducted a lengthy hearing." (App. G, p. 68).

[41]28 U.S.C. § 1292(b). Respondents' choice not to appeal the federal order is immaterial, as is the Fourth Circuit Court of Appeals' discretion to deny the appeal. The general rule denying preclusive effect to an unappealable order "does not apply in cases [such as the case at bar] where review is available but is not sought. Nor does it apply when there is discretion in the reviewing court to grant or deny review and review is denied; such denials by a first tier appellate court are generally tantamount to a conclusion that the questions raised are without merit." Restatement (Second) of Judgments § 28 (1982).

[42]For the opposite side of this coin, *see Age Int'l, Inc. v. Miller*, 830 F. Supp. 1484, 1496 (N.D. Ga. 1993).

Due Process Clause is that states must provide taxpayers a full hearing and judicial determination at which they may raise any and all constitutional objections.[43]

In finding the Tax Injunction Act inapplicable, the federal court determined that North Carolina failed to provide Petitioners with the opportunity for a hearing and judicial determination at which they could raise their constitutional objections to the discriminatory taxation of their federal pay. *Rosewell*, 450 U.S. at 514; (App. G, p. 71). *A priori*, Petitioners established, and the federal court determined that North Carolina did not provide "a fair opportunity to challenge the accuracy and legal validity of their tax obligation" -- a due process violation. *McKesson*, 496 U.S. at 39. Thus, had it given the federal order proper preclusive effect, the court below could not have concluded that Section 267 provided due process.

Review of North Carolina's violation of federalism principles by applying a result-oriented collateral estoppel definition is necessary to uphold the fundamental precept that states must respect, not disregard, federal court decisions. If state courts can eviscerate federal orders by applying state preclusion law, federal courts will no longer provide a reliable forum to adjudicate federal claims. The opinion below rejects "the final power of the Federal courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution . . . . " *Deposit Bank v. Frankfort*, 24 S. Ct. 154, 162 (1903). Accordingly, *certiorari* should be granted.

---

[43]Compare this Court's discussion of the Tax Injunction Act standard in *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514 (1981) (A plain, speedy, and efficient remedy is one that provides a "taxpayer with a full hearing and judicial determination at which he or she may raise any and all constitutional objections to the tax") (internal quotations omitted) with the due process discussion in *McKesson*, 496 U.S. at 39 n.22 ("The fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner.'" In the context of state taxation where no pre-deprivation remedy exists, due process requires a state to provide not only "a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

CONCLUSION

Left intact, the decision below will signal to North Carolina, and other states as well, that meaningless procedural requirements will avoid retroactive application of this Court's decisions on the constitutionality of state tax laws. It will also signal that, when federal district courts are forced to intervene, states will be able to ignore them. With such a free hand to impose unconstitutional taxes (because the only practical risk is prospective repeal of the offending statute), states will have little incentive to ensure that their tax laws are constitutionally sound. Equally significant, citizens will be forced to suffer unconstitutional taxation with no hope of a meaningful remedy.

Therefore, and for all of the foregoing reasons, Petitioners respectfully request that this Court issue a writ of *certiorari* to the Supreme Court of North Carolina.

Respectfully submitted,

G. Eugene Boyce*
William C. Raper
Keith W. Vaughan
Robert E. Fields, III
Lawrence Pierce Egerton
Kimberly C. Stevens

Womble Carlyle Sandridge & Rice
A Professional Limited Liability Company
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100

Charles H. Taylor
4295 Shattalon Drive
Winston-Salem, NC 27106
(910) 924-6064
Attorneys for Petitioners

*Counsel of Record
May 23, 1994

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NORMAN W. SWANSON, et al.,
Class A Petitioners,

and

CHARLES L. BERRY, et al.,
Class B Petitioners,

V.

THE STATE OF NORTH CAROLINA, et al.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI APPENDIX

Charles H. Taylor
4295 Shattalon Drive
Winston-Salem, NC 27106
(910) 924-6064

G. Eugene Boyce*
William C. Raper
Keith W. Vaughan
Robert E. Fields III
Lawrence Pierce Egerton
Kimberly C. Stevens
WOMBLE CARLYLE
SANDRIDGE & RICE
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100

*Counsel of Record
May 1994

Attorneys for Petitioners

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

NORMAN W. SWANSON, et al., Class A Plaintiffs, CHARLES L. BERRY, et al., Class B Plaintiffs, vs. THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE STATE OF NORTH CAROLINA, Defendants.	**[Filed March 4, 1994]** **In the Office of** **Clerk Supreme Court** **of North Carolina** No. 64PA91-Wake

On remand from the United States Supreme Court. Heard in the Supreme Court 17 November 1993.

Womble Carlyle Sandridge & Rice, by G. Eugene Boyce, and Charles H. Taylor for plaintiff-appellees.

Michael F. Easley, Attorney General, by Edwin M. Speas, Jr., Senior Deputy Attorney General, Thomas F. Moffitt and Norma S. Harrell, Special Deputy Attorneys General, and Marilyn R. Mudge, Assistant Attorney General, for defendant-appellants.

EXUM, Chief Justice.

This is an action by plaintiffs, former federal employees and active duty federal military personnel and reservists, for the refund of certain income taxes paid by them before the 28 March 1989 decision of the United States Supreme Court in *Davis v Michigan Department of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989) We conclude the action may not be maintained because plaintiffs failed to comply with the procedural prerequisites of N.C.G.S. § 105-267 (1992). We, therefore, reverse the entry of summary judgment for plaintiffs entered by the trial court and remand for entry of judgment for defendants dismissing the action.

Before *Davis*, twenty-three states, including North Carolina, exempted retired state employees from payment of income tax on pension benefits. Retired federal employees were exempt from payment of state income taxes on the first $3,000 of their pension benefits. There was no exemption for beneficiaries of private pensions. As of 1979, the first $1,500 of income for members of the North Carolina National Guard was excluded from taxation. In 1989, the State amended this benefit so that members of the National Guard received a $1,500 deduction. The State conferred no comparable benefit on members of the federal armed forces.

In *Davis* the United States Supreme Court held that a state statute exempting state employees' retirement benefits from taxation but not granting the same exemption to their federal counterparts violated the constitutional doctrine of intergovernmental tax immunity and 4 U.S.C. §111 (1989). Under section 111 the federal government "consents to [state] taxation of pay or compensation for personal service as an officer or employee of the United States . . . if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111.

Responding to Davis, the North Carolina General Assembly amended its taxation scheme. First, it repealed the tax exemption for the retirement benefits of state employees retroactive to 1 January 1989 and created a $4,000 exclusion for the retirement benefits of both state and federal employees. N.C.G.S. § 105-134.6(b) (1992). Second, it authorized federal retirees to claim a tax credit on their 1990, 1991, and 1992 income taxes for taxes paid in 1988 on their federal pensions. N.C.G.S. § 105-151.20 (1992). Third, it repealed the $1,500 deduction for National Guard compensation. 1989 N.C. Sess. Laws, ch. 1002 (1990).

This is the third time this case has come before us. We first held plaintiffs were not entitled to the refunds claimed because the decision in *Davis* did not apply retroactively. *Swanson*, 329 N.C. 576, 407 S.E.2d 791 (1991) (*Swanson I*). Next we concluded, on rehearing, that certain provisions in our state constitution afforded plaintiffs no relief, and we reaffirmed our earlier decision. *Swanson*, 330 N.C. 390, 410 S.E.2d 490 (1991) (*Swanson II*). The result of the *Swanson* decisions was to reverse the trial court's order granting Plaintiffs income tax refunds for the years 1986 through 1989 and to dismiss plaintiffs' action.

Plaintiffs then petitioned the United States Supreme Court for review of the *Swanson* decisions. On 28 June 1993, the United States Supreme Court granted plaintiffs' petition for writ of certiorari, vacated our decisions in *Swanson I* and *Swanson II*, and remanded the case for further consideration in light of its holding in *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 125 L. Ed. 2d 74 (1993), that *Davis* must be applied retroactively. *Swanson v. North Carolina*, ___ U.S. ___ 125 L. Ed. 2d 713 (1993).

Plaintiffs moved this Court to remand the case to superior court "for implementation of orders previously entered," or, alternatively, for additional briefing and argument on the meaning and effect of *Harper*. On 29 July 1993, the Court denied

plaintiffs' motion for remand, granted plaintiffs' alternative motion and directed the parties to file additional briefs on the remaining issues pending before this Court and any other issues raised by *Harper*.

I.

Plaintiffs contend they are entitled to full refunds for income taxes paid by them on pension benefits for the tax years 1985 through 1988 pursuant to North Carolina's taxation statutes held unconstitutional in *Davis*. We conclude plaintiffs are procedurally barred from recovering in this action the refunds sought because they did not comply with the State's statutory postpayment refund demand procedure.

The sole procedure by which a North Carolina taxpayer may challenge the legality of any tax is as follows:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. *At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue* and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within the three years after the expiration of the 90-day

> period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2.

N.C.G.S. § 105-267 (emphasis added).

In *Bailey v. North Carolina*, 330 N.C. 227, 412 S.E.2d 295 (1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 547 (1992), this Court held that "[w]hen a tax is challenged as unlawful rather than excessive or incorrect, the appropriate remedy is to bring suit under N.C.G.S. § 105-267." *Id.* at 235, 412 S.E.2d at 300. That the challenge is to the constitutionality of the tax does not exempt a taxpayer from following the statute's mandatory procedure. *Id.* Failure to comply with the requirements in section 105-267 bars a taxpayer's action against the State for a refund of taxes. *Id.* at 236, 412 S.E.2d at 301.

The plaintiffs in Bailey, state and local government employees whose retirement benefits had vested, brought suit against the State, claiming it had violated assurances that their benefits would be exempt from state income tax. We held that "[i]nsofar as plaintiffs' complaint seeks a refund of 1989 taxes paid, it should have been dismissed for failure of plaintiffs to satisfy conditions precedent to such an action as required by N.C.G.S. § 105-267." *Id.* at 234, 412 S.E.2d at 300. We said:

> A taxpayer with "a valid defense to the enforcement of the collection of a tax" must first

> pay the tax, then demand a refund of that tax in writing within thirty days after payment. Only when the Secretary of Revenue fails to refund the tax within ninety days may the taxpayer sue the Secretary of Revenue for the amount demanded. Absent protest in the form of a demand for refund, a tax is voluntarily paid, and "voluntary payments of unconstitutional taxes are not refundable." *Coca-Cola Co. v. Coble*, 293 N.C. [565,] 569, 238 S.E.2d [780,] 783. The right to sue in a conditional right; the terms prescribed are conditions precedent to the institution of the action. Plaintiffs must allege and prove they demanded a refund within thirty days after payment. Failure to do so forfeits the right to sue. *Kirkpatrick v. Currin, Comr. of Revenue*, 250 N.C. [213,] 216, 108 S.E.2d [209,] 211; *Stenhouse v. Lynch*, 37 N.C. App. 280, 281, 245 S.E.2d 830, 831 (1978).

Id. at 236, 412 S.E.2d at 301. The purpose for this statutory protest requirement is that,

> Where protest has been interposed, the [taxing authority] is notified that it may be obliged to refund the taxes and is required to be prepared to meet that contingency. If no protest has been lodged, it is generally assumed that taxes paid can be retained to meet authorized public expenditures, and financial provision is not made for contingent refunds.

Id. at 238, 412 S.E.2d at 302 (quoting *Conklin v. Town of Southampton*, 141 A.D.2d 596, 598, 529 N.Y.S.2d 517, 519 (1988) (quoting *Mercury Mach. Importing Corp. v. City of New York*, 3 N.Y.2d 418, 426, 144 N.E.2d 400, 404, 165 N.Y.S.2d 517, 521 (1957)).

In *Bailey* all demand letters sent to the Secretary of Revenue were preceded by the plaintiffs' complaint. *Id.* at 237, 412 S.E.2d at 301. The Court held the plaintiffs' "demands for refunds followed neither the letter of the statute nor the reasonable criteria required by the Secretary of Revenue and were properly rejected and deemed invalid for purposes of suing for refunds under N.C.G.S. § 105-267." *Id.* at 238-39, 412 S.E.2d at 302.

Here plaintiffs sent a "class demand letter" on 14 April 1989 to Helen A. Powers, Secretary of the North Carolina Department of Revenue, requesting refund of all income taxes paid on pension benefits for tax years 1985 to 1989. A second class demand letter was sent to Secretary Powers on 18 April 1989. On 11 July 1989 Secretary Powers responded to plaintiffs' letters of demand as follows:

> In order to constitute a valid demand for refund under G.S. 105-267, a taxpayer's request must include sufficient information to permit the Department to determine whether a refund may be made and, if so, in what amount. Such information would normally consist of the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of federal retirement income received by the taxpayer during the year.
>
> To the extent that your letters furnish information concerning the named taxpayers sufficient to determine the amount of tax which they paid with respect to the federal retirement income for each year in question, the Department will, pursuant to G.S. 105- 267, issue refunds for any such tax paid by those persons within the thirty days preceding the date of your letter.

> To the extent that your letter makes demand for refund of taxes paid by unnamed persons or by named persons not sufficiently identified to permit a determination as to their liability, your letter will not be considered a valid demand for refund, and no refunds will be issued.[1]

Plaintiffs filed this suit against Secretary Powers in her official capacity and individually on 16 March 1990 seeking refund of income taxes paid on pension benefits from 1985 to 1989. Thereafter, on 12 April 1990 plaintiffs sent a similar third class demand letter to Secretary Powers. Secretary Powers responded to plaintiffs' third demand letter by stating,

> Your letter does not identify any individual taxpayer, nor does it furnish information sufficient to determine the amount of tax which any taxpayer paid with respect to federal military or retirement income for any of the taxable years in question. Accordingly, your letter will not be considered a valid demand for refund, and no refunds will be issued.

The three class demand letters filed by plaintiffs were invalid protests and, as such, did not satisfy the requirements of section 105-267. "N.C.G.S. § 105-267 does not expressly prohibit taxpayers from seeking refunds as a class"; however, "it includes no provision for a tax refund demand to be made either by taxpayers as a class or as represented by others." *Id.* at 237, 412 S.E.2d at 301. "Even when taxpayers are seeking a tax refund as a class, the requisites of N.C.G.S. § 105-267 must be

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[1]As of 19 February 1990 the State, presumably pursuant to this letter, had refunded $9,145,523.92 to 12,404 taxpayers in plaintiff classes who timely filed refund requests pursuant to section 105-267. The State denied approximately $8,000,000 of refunds for 1988 taxes paid by taxpayers in plaintiff classes.

met." *Id.* (footnote omitted). Plaintiffs' action "cannot be maintained unless preceded by an individual notice, protest or demand." *Id.* at 239 n.4, 412 S.E.2d at 202 n.4. "[A]bsent specific statutory authorization for class or representative tax refund demands, such [class] demands are ineffectual to satisfy this condition precedent to legal action for a tax refund under N.C.G.S. § 105-267." *Id.* at 240, 412 S.E.2d at 303.[2]

The only demands for tax refunds alleged or proved in this action are the class demand letters which we described above. Since these class demand letters do not constitute refund demands as required by section 105-267, this necessary prerequisite to filing this action against the State for the refunds claimed has not been met. The action therefore must be dismissed provided these procedures comport with constitutional due process, a question we now address.

II.

Plaintiffs contend the statutory refund procedure transgresses the Due Process Clause of the Fourteenth Amendment of the United States Constitution insofar, as it bars full refunds to plaintiffs for tax years 1985 through 1988 which, plaintiffs contend, are required by the United States Supreme Court's decision in *Harper v. Virginia Department of Taxation*, 509 U.S. ___ 125 L. Ed. 26 74.

We do not agree. Rather, we conclude that in light of both *Harper* and *McKesson Corporation v. Division of Alcoholic Beverage and Tobacco*, 496 U.S. 18, 110 L. Ed. 2d 17 (1990), the refund procedure provided in section 105-267 is free from any constitutional infirmity. It may, therefore, effectively bar actions

---

[2]Plaintiffs contend section 105-267 unconstitutionally denies them the right to bring a class action suit. We disagree. Once taxpayers have individually met the requirements of section 105-267, they are free to pursue their claim as a class.

for refunds in the tax years for, which the procedure was not followed.

Admittedly, this statute does not permit North Carolina taxpayers to challenge the legality, or constitutionality, of a tax before paying the tax. It does not, in other words, provide for a predeprivation remedy for the taxpayer. Instead it requires the taxpayer first to pay the tax sought to be challenged; second, to demand within 30 days of payment that the tax be refunded; and third, if the state refuses within 90 days to make the refund, the taxpayer must bring suit against the state for the refund within three years of the expiration of the 90-day period. As we have shown above, the timely demand for refund is a prerequisite for bringing suit against the State to recover the challenged tax.

We are convinced this procedure comports with due process under the United States Supreme Court's jurisprudence on the subject as it relates to taxation. That Court has long held that postdeprivation remedies in the area of taxation can comport with due process. *Cheatham v. United States*, 92 U.S. 85, 89-90, 23 L. Ed. 561, 562-63 (1875) (government has right to prescribe conditions on which it will subject itself to judgment of the courts in collection of revenues); *Dodge v. Osborn*, 240 U.S. 118, 122, 60 L. Ed. 557, 560 (1916) (requirement that taxes be paid and administrative procedures exhausted before suit for recovery could be filed does not violate due process); *Bob Jones University v. Simon*, 416 U.S. 725, 747, 40 L. Ed. 26 496, 515 (1974) (congressional restriction to postenforcement review of an organization claiming tax-exempt status is not constitutionally infirm in light of the powerful government interests in protecting the administration of the tax system from premature judicial interference).

The principle that due process does not require predeprivation remedies in the area of taxation was most recently reaffirmed in *McKesson*, 496 U.S. 18, 110 L. Ed. 2d 17. The *McKesson* Court held postdeprivation remedies for tax refunds are

sufficient to meet due process standards provided taxpayers are afforded meaningful backward-looking relief for taxes paid under a tax scheme subsequently found to be unconstitutional. *McKesson*, 496 U.S. at 22, 110 L. Ed. 2d at 27.

In *McKesson*, the petitioner challenged a Florida tax scheme which afforded special rate reductions for certain specified citrus, grape, and sugarcane products, all of which are commonly grown in Florida and used in alcoholic beverages produced in the state. The petitioner, a wholesale distributor of alcoholic beverages whose products did not qualify for the rate reduction, followed the statutory procedure for repayment or refund of taxes by paying the applicable taxes each month and then seeking a refund from the Florida Office of the Comptroller on the ground that the tax scheme unlawfully provided preferences for distributors of certain local products. Upon denial of its refund request, petitioner brought suit in a Florida trial court against the comptroller and the Florida Division of Alcoholic Beverages. The petitioner's suit challenged the constitutionality of the tax under both the Federal Constitution's Commerce Clause and other federal and state constitutional provisions. The petitioner requested declaratory and injunctive relief, and sought a refund of the excess taxes it had paid because of the tax scheme's discriminatory treatment. The trial court enjoined the state from giving effect to the preferences in the future, but refused to provide a refund or any other relief to the petitioner for taxes it had already paid.

In affirming the trial court's order, the Florida Supreme Court held that while the preferential rate reductions should be given no future operative effect, the petitioner was not entitled to a refund of previously paid taxes. The court reasoned that the Division of Alcoholic Beverages and Tobacco had relied in good faith on a presumptively valid statute. Additionally the petitioner, if given a refund, would most likely receive a windfall, since the cost of the tax likely had been passed on to its customers.

The United States Supreme Court reversed, holding that postdeprivation remedies for unlawful taxes do not meet due process standards if a taxpayer who has paid the illegal tax meets the statutory requirements for a remedy, but is limited to prospective relief. *Id.* at 31, 110 L. Ed. 2d at 32. The Court held:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge that tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.
>
> Florida requires taxpayers to raise their objections to the tax in a postdeprivation refund action. To satisfy the requirements of the Due Process Clause, therefore, in this refund action the State must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a clear and certain remedy.

Id. at 38-39, 110 L. Ed. 2d at 37.

McKesson was a troubling case because Florida did not provide a full refund of the challenged tax even after the taxpayer complied with all of the procedural requirements for challenging the tax later determined to be unconstitutional. *McKesson* makes abundantly clear, as do the cases it cites, that a full refund of the challenged tax is all that due process requires provided that a fair opportunity to contest the tax is given. The Court said:

> The State may, of course, choose to erase the property deprivation itself by providing petitioner with a full refund of the tax payments.

. . . .

> In the end, the State's postdeprivation procedure would provide petitioner with all of the process it is due: an opportunity to contest the validity of the tax and a "clear certain remedy" designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property.

Id. at 39-40, 110 L. Ed. 2d at 38. There can, of course, be no clearer or more certain remedy nor more meaningful backward-looking relief than a full refund of the challenged tax.

Plaintiffs contend, nevertheless, that the State cannot, consistent with due process, deprive them of full refunds of all taxes paid in all tax years within the period of the statute of limitations even though these taxes were not duly challenged under the procedures established by section 105-267. Again, *McKesson* answers this contention adversely to plaintiffs' position.

McKesson holds that a state may provide full refunds to taxpayers, and at the same time, protect its fiscal stability by imposing "various procedural requirements on actions" seeking such refunds:

> The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such action . . . . The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

Id. at 45, 110 L. Ed. 2d at 41. Indeed, in remanding the case to the Florida Supreme Court, the United States Supreme Court noted, "upon remand the State may invoke as an independent basis for refusing to provide a refund, petitioner's failure to comply with a notice requirement that was in effect at the time of petitioner's tax payments." *Id.* at 24 n.4, 110 L. Ed. 26 at 28 n.4.

North Carolina thus gives taxpayers desiring to challenge the illegality, or unconstitutionality, of a tax a clear and certain remedy and meaningful, backward-looking relief by providing a full refund of the tax if the challenge is successful. It also provides a clear and fair opportunity to contest the tax by the procedures set out in section 105-267. Denial of refunds to taxpayers for the tax years for which they failed to comply with this procedure does not, as the Court made clear in *McKesson*, deprive these taxpayer of constitutional due process.[3]

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[3]A "state is free, of course, to provide broader relief as a matter of state law than is required by the Federal Constitution. *McKesson*, 496 U.S. at 52 n.36, 110 L. Ed. 2d at 45 n.36. The North Carolina General Assembly has chosen to do this by enacting N.C.G.S. § 105-151.20, which provides:

> A taxpayer who received government retirement benefits during the 1988 tax year may claim a credit against the tax imposed by this Division equal to the amount by which the tax under this Division paid by the taxpayer for the 1988 tax year would have been reduced if one of the taxpayer' s government retirement benefits had been included in the taxpayer's taxable income. If a taxpayer received a refund of any tax paid under this Division on government retirement benefits for the 1988 tax year, the amount of the refund reduces the amount of the credit allowed under this section .
>
> . . .
>
> The credits allowed under this section shall be taken in equal installments over the taxpayer's first three taxable years beginning on or after January 1, 1990. The credit allowed under this section may not exceed the amount of tax imposed by this Division reduced by the sum of all credits allowed

Other jurisdictions reviewing taxpayers' eligibility for refunds of taxes paid pursuant to a statute subsequently pronounced unconstitutional, have applied the due process principles articulated in *McKesson* and, in several cases, have awarded or denied refunds to taxpayers on the basis of their compliance with state procedural refund requirements. *Jenkins v. Missouri*, 962 F.2d 762 (8th. Cir. 1992) (refund of unlawfully levied tax limited to those taxpayers who paid under protest), *cert. denied*, _____ U.S. _____, 121 L. Ed. 2d 242 (1992); *Farrer v. Franchise Tax Board*, 15 Cal. App. 4th 10, 18 Cal. Rptr. 26 611 (1993) (failure to provide timely notice of class claim warranted dismissal of claim for refunds), *cert. denied*, ___ U.S. ___, ___ L. Ed. 2d __, 62 USLW 3449, 62 USLW 3451 (Jan. 10, 1994); *Hagge v. Iowa Department of Revenue and Finance*; 504 N.W.2d 448 (Iowa 1993) (refund awarded to taxpayers who timely filed amended returns within the limitation period); *Ragsdale v. Department of Revenue*, 312 Or. 529, 823 P.2d 971 (1992) (statutes requiring taxpayer to file legal action before becoming eligible for refunds and denying taxpayer refunds for taxes collected prior to the filing of the action was a reasonable procedural barrier).

Plaintiffs contend that by its later decision in *Harper*, the United States Supreme Court somehow altered *McKesson*. Their argument seems to be that *Harper*, if not *McKesson*, requires a refund of the taxes paid in all tax years within the period of the statute of limitation even though the taxpayers failed to comply with the statutory procedures for challenging the tax for those years. We disagree. In our view, insofar as *Harper* addressed due process concerns with regard to statutes providing relief from

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against the tax except payments of the tax made by or on behalf of the taxpayer.

N.C.G.S. § 105-151.20 (1992). Thus federal retirees who were ineligible for tax refunds because of failure to comply with protest requirements were entitled to relief for the 1988 tax year in the form of tax credits.

unconstitutional taxes, it reaffirmed what was held and said in *McKesson*.

The issue in *Harper* was whether the Virginia Supreme Court had erred in not giving retroactive effect to *Davis*. The United States Supreme Court concluded that it had. *Harper* involved an action for refund of taxes unlawfully assessed for the years 1985 to 1988 in violation of *Davis*. In response to *Davis*, Virginia had repealed its exemption from state income taxation for state and local government employees. It also enacted a statute under which taxpayers could seek a refund of state taxes imposed on federal retirement benefits in the years 1985, 1986, 1987 and 1988 for up to one year from the date of the final determination as to whether Virginia must refund these taxes.

The petitioners in *Harper*, 421 federal civil service and military retirees in Virginia, sought refunds of the taxes improperly or erroneously assessed. The trial court denied the refunds on the ground that the *Davis* decision was to be applied prospectively. The Supreme Court of Virginia affirmed, concluding that because *Davis* was to be applied prospectively, the pre-Davis assessments were not improper under Virginia's tax refund statute.

The United States Supreme Court vacated the Virginia Supreme Court's decision and remanded the case in light of the Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. _____, 115 L. Ed. 2d 481 (1991), which held that an earlier decision invalidating excise taxes on alcoholic beverages was retroactively applicable to claims arising from facts predating the earlier decision. On remand, the Supreme Court of Virginia affirmed its prior decision in all respects on the ground that the issue of retroactivity was not decided in *Davis* because Michigan had not contested plaintiff's entitlement to a refund.

Reversing the Virginia Supreme Court, the United States Supreme Court held that *Davis* was to be applied retroactively.

The Court noted, however, that retroactive application of *Davis* did not necessarily entitle the petitioners to a refund. Rather, Virginia was only required to provide relief consistent with federal due process. *Harper*, 509 U.S. at ____, 125 L. Ed. 2d at 88. The *Harper* Court did not fashion a new test for due process. Instead, it relied on well-established tests enunciated in *McKesson* and earlier cases. The Court said:

> Because we have decided that *Davis* applies retroactively to the tax years at issue in petitioners' refund action, we reverse the judgment below. We do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund. Rather, the Constitution requires Virginia "to provide relief consistent with federal due process principles." *American Trucking*, 496 U.S. at 181, 110 L. Ed. 2d 148, 110 S.Ct. 2323 (plurality opinion). Under the Due Process Clause, U.S. Const., Amdt. 14, § 1, "a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39-40, 110 L. Ed. 2d 17, 110 S.Ct. 2238 (1990). If Virginia "offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing," the "availability of a predeprivation hearing constitutes a procedural safeguard sufficient by itself to satisfy the Due Process Clause." *Id.* at 38, n.21, 110 L. Ed. 26 17, 110 S.Ct. 2238. On the other hand, if no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* at 31, 110 L.

> Ed. 2d 17, 110 S.Ct. 2238 (footnotes omitted). In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that "create(s) in hindsight a nondiscriminatory scheme." *Id.* at 40, 110 L. Ed. 26 17, 110 S.Ct. 2238. *Cf. Davis*, 489 U.S: at 818, 103 L. Ed. 26 891, 109 S.Ct. 1500 (suggesting that a State's failure to respect intergovernmental tax immunity could be cured "either by extending [a discriminatory] tax exemption to retired federal employees . . . or by eliminating the exemption for retired state and local government employees").

Id. at ___, 125 L. Ed. 2d at 88-89.

The *Harper* Court also noted that were Virginia to have provided an adequate predeprivation remedy, that is, a "meaningful opportunity for taxpayers to withhold contested tax assessments and challenge their validity in a predeprivation hearing," due process would be satisfied. *Id.* at ___, 125 L. Ed. 2d at 89 (quoting *McKesson*, 496 U.S. at 38, 110 L. Ed. 2d at 37).

Where no such predeprivation remedy exists, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *Id.* (quoting *McKesson*, 496 U.S. at 31, 110 L. Ed. 2d at 32).

In its brief before the Supreme Court the State of Virginia argued that "[t]axpayers in Virginia are entitled to challenge a tax assessment in a prepayment procedure set forth in §§ 58.1-1821 and 58.1-1822 of the Virginia Code." Brief for Respondent at 47, *Harper v. Virginia Department of Taxation*, 509 U.S. _____, 125 L. Ed. 2d 74 (1993). Thus, Virginia contended petitioners "had a clear, meaningful, prepayment opportunity to challenge the

validity of the tax of which they now complain." *Id.* The sufficiency of this predeprivation procedure had not been reviewed by the Virginia Supreme Court. The United States Supreme Court held:

> The constitutional sufficiency of any remedy thus turns (at least initially) on whether Virginia law "provide[s] a[n] [adequate] form of 'predeprivation process,' for example, by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or by allowing taxpayers to withhold payment and then interpose their objections gas defenses in a tax enforcement proceeding." *McKesson*, 496 U.S. at 36-37, 110 L. Ed. 2d 17, 110 S.Ct 2238. Because this issue has not been properly presented, we leave to Virginia courts this question of state law and the performance of other tasks pertaining to the crafting of any appropriate remedy. Virginia is free to choose which form of relief it will provide, so long as that relief satisfies the minimum federal requirements we have outlined." *Id.* at 51-52, 110 L. Ed. 26 17, 110 S.Ct 2238.

Harper, 509 U.S. at ___, 125 L. Ed. 2d at 89. The constitutionality of a postdeprivation remedy, such as that afforded in North Carolina, was not before the Court in *Harper*. The Court chose to comment on, but did not decide, whether Virginia's predeprivation remedy satisfied due process.

Thus, *Harper* did not modify the Court's previous jurisprudence, including McKesson, regarding the tests for determining whether a state's postdeprivation remedy by which a tax may be challenged on legal or constitutional grounds satisfies due process. Rather, the *Harper* Court made it clear that a state

satisfied due process if it offered taxpayers relief consistent with the due process standards delineated in McKesson.

III.

We next turn to plaintiffs' argument that any defenses by the State under section 105-267 to plaintiffs' federal challenges have been settled by res judicata and collateral estoppel. The basis of plaintiffs' argument is the denial of the State's motion to dismiss based on the Tax Injunction Act, 28 U.S.C. § 1341, in the companion case brought by plaintiffs in The United States District Court for the Eastern District of North Carolina, Raleigh Division. *Swanson v. Powers* (E.D.N.C. 1990) (No. 89-282-CIV-5-H). We find no merit in this argument because there has been no final adjudication of the federal case.

> Under *res judicata*, a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them. When the plaintiff prevails, his cause of action is said to have "merged" with the judgment; where defendant prevails, the judgment "bars" the plaintiff from further litigation. In either situation, all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded. See Restatement (Second) of Judgments 18, 19 (1982); 1B Moore's Federal Practice 405[1] at 181-85 (2d ed. 1984).

Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 556-57 (1986). For *res judicata* to apply, a party must show that a "previous suit has resulted in final judgment on the merits, that the same cause of action is involved, and that [plaintiffs] and [the State] were either parties or stand in privity with parties." *Id.* at 429, 349 S.E.2d at 557. Similarly,

> Under collateral estoppel as traditionally applied, a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies. See Restatement (Second) of Judgments § 27 (1982); 1B Moore's Federal Practice 0.441[1] at 718 (2d ed. 1984).

Id. (footnote omitted). Thus, collateral estoppel, like *res judicata*, only occurs "when there has been a final judgment or decree." *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973).

In the federal case, by an order dated 26 October 1993, United States District Judge Malcom H. Howard found that "a final judgment has not been issued in this case and . . . this court has never ordered that this case be closed"; and Judge Howard ruled "the court hereby puts all parties on notice that this case is not closed and the court stands ready to hear any and all matters that properly come before it." *Swanson v. Powers* (E.D.N.C. 1990) (No. 89-282-CIV-5-H). Because the requisite element of a final judgment is lacking, neither *res judicata* nor collateral estoppel based on the federal litigation apply.

For the foregoing reasons, the decision of the superior court granting summary judgment in favor of plaintiffs is reversed. The case is remanded for entry of judgment for defendants dismissing the action.

Reversed and remanded.

No. 64PA91 - Swanson, et al. v. State [Filed: March 4, 1994]

Justice MITCHELL dissenting.

Neither the defendants nor the majority of this Court dispute the fact that the defendants have unlawfully collected taxes from the plaintiffs through the application of an unconstitutionally discriminatory tax. The issue is whether the defendants must return the money they have unlawfully taken from the taxpayer-plaintiffs, or may keep that money because the plaintiffs have not sought to recover it in strict accordance with the requirements set forth in N.C.G.S. § 105-267. I believe that under the particular facts presented by this case, the plaintiffs have been denied due process of law. Therefore, I must dissent from the opinion of the majority which holds to the contrary and denies relief to the taxpayer-plaintiffs.

At the outset, I take exception to the apparent view of the majority that by failing to comply with the procedural prerequisites of N.C.G.S. § 105-267, the plaintiffs somehow voluntarily paid the unconstitutional taxes in question. When, as here, a tax is paid to avoid financial sanctions or a seizure of real or personal property, the tax is paid under duress. *McKesson v. Division of Alc. Bev.*, 496 U.S. 18, 39 n.21, 110 L Ed. 2d 17, 37 n.21 (1990).

> In contrast, if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed "voluntary." The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivation sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure.

Id. As the opinion of the majority concedes, North Carolina law did not provide the plaintiffs with any form of predeprivation remedy. Therefore, they may not be denied recovery on the basis

of any ruling grounded in the motion that they have somehow voluntarily paid the unconstitutional taxes in question, thereby rendering those unlawfully collected taxes nonrefundable.

> When, as here, the State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

Id. at 31, 110 L. Ed. 2d at 32 (footnotes omitted). "In providing such relief, a State may either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" *Harper v. Virginia Dept. of Taxation*, 509 U.S. _____, 125 L. Ed. 2d 74, 89 (1993) (quoting *McKesson*, 496 U.S. at 40, 110 L. Ed 2d at 38). Any such postdeprivation procedure provides all of the process due, if it provides "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. it 40, 110 L. Ed. 2d at 38. I am convinced under the facts presented by the present case, however, that N.C.G.S. § 105-267 does not provide these plaintiffs the type of meaningful backward-looking relief required by the Due Process Clause.

The opinion of the majority concludes that the taxpayer-plaintiffs were required under N.C.G.S. § 105-267 to make a postdeprivation demand upon the administrative functionaries responsible for collecting the taxes in question and then wait the required period of time thereafter before initiating any court action seeking to recover money taken from them unlawfully pursuant to an unconstitutional tax. However, courts have uniformly held that plaintiffs will not be required to exhaust administrative remedies

before bringing suit, where pursuing such administrative remedies would be futile. Pursuing an administrative remedy is "futile" when it is useless to do so either as a legal or practical matter. See *Honig v. Doe*, 484 U.S. 305, 327, 98 L. Ed. 2d 686, 709 (1988). For me, this clearly is a case in which it would have been futile for the plaintiffs to exhaust their administrative remedies under N.C.G.S. § 105-267 before seeking relief in the courts.

In the present case, neither of the State functionaries who have been made defendants in this case -- the Secretary of Revenue and the State Treasurer -- have or have ever had the authority to grant the relief sought by the taxpayer-plaintiffs. Those defendants, who have administrative responsibilities with regard to the tax at issue, did not and do not have the power to pass upon the constitutionality of that tax, since decisions as to the constitutionality of tax statutes are *exclusively* for the judiciary. *Bailey v. State of North Carolina*, 330 N.C. 227, 246, 412 S.E.2d 295, 306 (1991), *cert. denied*, _____ U.S. _____, 118 L. Ed. 2d 547 (1992). Thus, it is clear beyond question that the conclusion of the majority requiring these taxpayers to "jump through the procedural hoops adopted and applied by the State bureaucracy under N.C.G.S. § 105-267" amounts to a holding that they were entitled to relief only if they did an utterly vain and useless act. *Bailey*, 330 N.C. at 248-49, 412 S.E.2d at 308 (Mitchell, J., dissenting). That being the case, I reject the majority's view that the statute provides meaningful backward-looking relief of the sort which is adequate to satisfy minimum due process requirements. *See id.; Reich. v. Collins*, 437 S.E.2d 320, 322-25 (Ga. 1993) (Carley, J., joined by Sears-Collins, J., dissenting). Therefore, I also reject the majority's conclusion that the defendants are entitled to the entry of a judgment dismissing the taxpayers' action against them.

Under the opinion of the majority, these taxpayer-plaintiffs would be entitled to a refund only if they had foreseen at an early stage that the tax in question was unconstitutional -- foresight which would have exceeded that of the legislature, the defendants

who are experts in such matters, and this Court. *See Swanson v. State of North Carolina*, 329 N.C. 576, 407 S.E.2d 791 (1991), vacated and remanded, ___ U.S. ___ 125 L. Ed. 2d 713 (1993) (in which a majority of this Court held that these plaintiffs were not entitled to refunds of the taxes in question because the decision of the Supreme Court of the United States in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 103 L. Ed. 2d 891 (1989), declaring taxes such as that at issue here unconstitutional, did not apply retroactively). I am completely aware that a concern for the ability of taxing entities such as the various states and local governments to engage in sound fiscal planning has led to the adoption of rules which are heavily weighted against the taxpayers and in favor of the taxing entity in cases such as this. I believe, however; that the opinion of the majority in the present case goes well beyond any legitimate need supporting such concerns and upholds a sham procedure for postdeprivation relief which was futile from the outset in this case. Surely, this unseemly result may only be properly characterized as tilting the scales too far in favor of the taxing entity and denying these taxpayers fundamental due process.

For the foregoing reasons, I believe that the taxpayer-plaintiffs have been denied due process of law by the majority's interpretation and application of N.C.G.S. § 105-267. Therefore, I respectfully dissent. [Justice Parker joins in this dissenting opinion.]

APPENDIX B

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
90 CVS 03127

NORMAN W. SWANSON, et al.,

Class A Plaintiffs,

CHARLES L. BERRY, et al.,

Class B Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE STATE OF NORTH CAROLINA,

Defendants.

PARTIAL SUMMARY JUDGMENT

[Filed: October 3, 1990]

THIS MATTER came on for hearing before the undersigned judge of Superior Court on Plaintiffs' Motion for Partial Summary Judgment, filed 17 August 1990, pursuant to N. C. Gen. Stat. § 1A-1, Rule 56, in favor of Class A Plaintiffs on their claims for refunds of taxes unlawfully and unconstitutionally collected from them for tax years 1985 through 1988 and in favor of Class B Plaintiffs on their claims for refunds of taxes unlawfully and unconstitutionally collected from them for tax years 1986 through 1989.

The Court after carefully considering the parties' legal memoranda and evidentiary materials, including exhibits, affidavits, deposition transcripts, matters of record, and the arguments of counsel made in open court on 31 August 1990, has determined that no genuine issue of material fact exists and that Plaintiffs are entitled to summary judgment as a matter of law.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that Plaintiffs' Motion for Partial Summary Judgment be and is hereby GRANTED and that:

(1) Class A Plaintiffs, federal retirees, have and recover of Defendants, the State of North Carolina, Betsy Y. Justus as Secretary of the North Carolina Department of Revenue, the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina, refunds of North Carolina income taxes paid on their federal retirement benefits for tax years 1985 through 1988, with interest ~~from payment of said taxes~~ as provided by law (STC); and

(2) that Class B Plaintiffs, federal active duty and military reserve personnel, have and recover of Defendants, the State of North Carolina, Betsy Y. Justus as Secretary of the North Carolina Department of Revenue, the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina, refunds of North Carolina income taxes paid on their federal compensation as a result of their not being afforded a $1,500 per year exemption as were members of the North Carolina National Guard for tax years 1986 through 1989, with interest ~~from payment of said taxes~~ as provided by law (STC).

The clerk is directed to enter judgment herein in accordance with N. C. Gen. Stat., § 1A-1, Rule 58. With the consent of counsel given in open court, this Judgment is signed out of county, out of session and out of term.

/s/ Samuel T. Currin
SAMUEL T. CURRIN
Superior Court Judge

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY — 90 CVS 03127

NORMAN W. SWANSON, et al.,

Class A Plaintiffs,

CHARLES L. BERRY, et al.,

Class B Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE STATE OF NORTH CAROLINA,

Defendants.

PARTIAL SUMMARY JUDGMENT AND ORDER IN SUPPORT OF JUDGMENT ENTERED OCTOBER 3, 1990
[Filed: March 8, 1991]

THIS MATTER came on for hearing before the undersigned judge of Superior Court on Plaintiffs' Motion for Partial Summary Judgment for 1989 Tax Refunds and Injunctive Relief Against Future Taxation in Light of Subsequently Entered Judicial Order, filed 14 December 1990, pursuant to N. C. Gen. Stat. § 1A-1, Rule 56, and on Plaintiffs' Motion for Order in Support of Judgment to Limit the Effect of the 1988 Tax Credit, filed 14 December 1990.

The Court after considering the parties' legal memoranda and pertinent portions of the court file and matters of record, and

the arguments of counsel made in open court on 28 February 1991, has determined with respect to the Motion for Partial Summary Judgment that no genuine issue of material fact exists and that Plaintiffs are entitled to summary judgment as a matter of law, and with respect to Plaintiff's Motion for Order in Support of Judgment and that Plaintiffs are entitled to the relief sought.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, that Plaintiffs' Motion for Partial Summary Judgment be and is hereby GRANTED and that:

(1) Class A Plaintiffs, federal retirees, and Class B Plaintiffs, federal active duty and military reserve personnel, have and recover of Defendants, the State of North Carolina, Betsy Y. Justus as Secretary of the North Carolina Department of Revenue, the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina, refunds of North Carolina income taxes paid on their federal retirement benefits for tax years 1989 and subsequent, with interest from and after 15 April of each year following the taxable year for which the tax is paid, or the date of payment, whichever occurs later; and

(2) that Defendants, the State of North Carolina, Betsy Y. Justus as Secretary of the North Carolina Department of Revenue, the North Carolina Department of Revenue and Harlan Boyles, Treasurer of the State of North Carolina, be and hereby are enjoined from collecting any North Carolina income tax on the federal retirement benefits of all Plaintiff class members.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that Plaintiffs' Motion for Order in Support of Judgment To Limit the Effect of the 1988 Tax Credit be and is hereby GRANTED and that:

(3) If any class member uses the credit provided by G.S. § 105-151.20 to decrease the amount of North Carolina income tax owing by that class member (including a spouse's tax

liability on a joint return) for tax year 1990 or to create an overpayment, such use of the credit shall not constitute a compromise of the Partial Summary Judgment filed 3 October, 1990 in this action with respect to that class member, shall not obligate the class member to use the credit in future years, and shall not limit the class member's right to full recovery under the said Partial Summary Judgment of this Court. Provided, however, the class member's judgment amount shall be reduced by the amount of the credit used by the class member for 1990 either to create an overpayment or to reduce taxes legally due, which reduction shall be deemed a payment first of accrued interest and then of principal owing under the judgment, and which payment on the judgment shall be deemed to have been received by the class member on the later of the due date of his or her 1990 income tax return as extended or the date the return was mailed by the class member.

(4) If any class member does not use the credit provided by G.S. § 105-151.20 for tax year 1990, such failure shall not in any way reduce the amount of the liability of Defendants to the class member under the Partial Summary Judgment of this Court filed October 3, 1990.

(5) If any class member uses the credit as described in paragraph 3 above, the amount by which the Partial Summary Judgment of this Court filed October 3, 1990 is thereby satisfied shall remain subject to any attorneys fee this Court hereafter awards from the common fund of refunds produced by the judgments for Plaintiff class members. Defendants shall maintain accurate records of use of the credit for 1990 by class members' names, addresses, the amounts of credit used and the amounts of credit remaining. Defendants shall furnish such information to Plaintiffs' counsel monthly beginning on the first day of the month after the first month when any return is received by Defendants claiming the credit, and shall maintain such information for use by Defendants in administering class refunds.

(6) While this Court need not now address the possible use of the credit for 1991 and 1992, the Court reserves the issue of the application of the credit in future years and puts Defendants on notice that if due to a class member's use of the credit there are not sufficient funds remaining after use of the credit to cover any attorney's fees this Court may order, then Defendants may be held liable therefor, without the ability to collect same from the fund of recovery for Plaintiff classes.

The clerk is directed to enter judgment herein in accordance with N. C. Gen. Stat., § 1A-1, Rule 58. With the consent of counsel given in open court, this Judgment may be signed out of county, out of session and out of term.

This the 8th day of March, 1991.

/s/ Narley L. Cashwell
NARLEY L. CASHWELL
Superior Court Judge

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
90 CVS 03127

NORMAN W. SWANSON, et al.,

Class A Plaintiffs,

CHARLES L. BERRY, et al.,

Class B Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE STATE OF NORTH CAROLINA,

Defendants.

ORDER SUPPLEMENTING PARTIAL SUMMARY JUDGMENT

[Filed: December 31, 1990]

This cause coming on to be heard and being heard before the undersigned Judge Presiding on Plaintiff's Motion to Supplement Partial Summary Judgment and Other Affirmative Relief and Motion for Attorneys' Fees heretofore filed, and which said Motions were heard on 26 October 1990. Following said hearing the Court took the matters and issues under advisement, IT IS NOW THEREFORE ORDERED as follows:

1. Defendants' objection to Plaintiffs' Motion to Supplement Partial Summary Judgment and Other Affirmative

Relief and Motion for Attorneys' Fees for the reason that this Court is divested of jurisdiction to entertain said Motions by reason of Defendants' 18 October 1990 Notice of Appeal is hereby overruled.

2. Interest on any refunds paid pursuant to the Partial Summary Judgment shall be calculated from and after 15 April of each year following the taxable year for which the tax is paid, or the date of payment, whichever occurs later.

3. The responsibility and cost of administering class notification shall be borne by Defendants herein; provided, this portion of said Order is stayed during the pendency of any appeal to the Appellate Division of the General Court of Justice.

4. Plaintiffs' request that the Court require Defendants designate a common fund out of which refunds shall be paid is denied without prejudice to Plaintiffs to renew said motion in the event the granting of Plaintiffs' Motion for Partial Summary Judgment is affirmed either in whole or in part by the Appellate Division of the General Court of Justice, or in the event Plaintiffs' succeed on their other claims for relief contained in their complaint, which claims have not heretofore been ruled on.

5. Though no formal ruling was made on Defendants' Motion for Partial Summary Judgment, the granting of Plaintiffs' Motion for Partial Summary Judgment was a denial of Defendants' Motion as a matter of law. To clarify the Record, Defendants' Motion for Partial Summary Judgment is denied nunc pro tunc to 9 October 1990.

6. With regard to Plaintiffs' Motion for Attorneys' Fees, any such fees should be paid out of a common fund, if any such fund is hereafter established, but Plaintiffs' present Motion is denied without prejudice pending establishment of a common fund, if any, as hereinbefore referred to. In the event no common

fund is established, attorneys's fees shall be paid as the Court may direct as provided by law.

7. The Court determines there is no just reason for a delay in the appeal of this action in that the partial summary judgment, as supplemented, constitutes a final judgment as to fewer than all the issues or parties within the meaning of N.C. Gen. Stat. §1A-1, Rule 54(b) and the order on class certification constitutes an intermediate order involving the merits and necessarily affecting the judgment within the meaning of N.C. Gen. Stat. §1-278.

Counsel for all parties stipulated and agreed in open court that this order could be signed out of term or out of district if that should become necessary.

This the 31st day of December, 1990.

/s/ Samuel T. Currin
SAMUEL T. CURRIN
Judge Presiding

APPENDIX C

IN THE SUPREME COURT OF NORTH CAROLINA

NORMAN W. SWANSON, et al., Class A Plaintiffs, CHARLES L. BERRY, et al., Class B Plaintiffs, vs. THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE STATE OF NORTH CAROLINA, Defendants.	[Filed: August 14, 1991] No. 64PA91 - Wake

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of orders entered by Currin, J., on 17 August 1990, 3 October 1990 and 31 December 1990 in Superior Court, Wake County. Heard in the Supreme Court 7 May 1991.

This is an action by the plaintiffs for the refund of certain taxes paid by them prior to the decision of the United States Supreme Court in Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 103 L.Ed.2d 891 (1989). Prior to this decision by the United

States Supreme Court, which was filed on 28 March 1989, the pensions of retired employees of the State of North Carolina had been since 1941 exempt from income taxes imposed by the State. Retired federal government employees were exempted from payment of taxes on the first $3,000.00 on their pension benefits. There was no exemption for those who were beneficiaries of private pensions. Beginning in 1979 the first $1,500.00 of pay for members of the National Guard was excluded from taxation. In 1989 this was changed so that members of the National Guard received a $1,500.00 deduction. No comparable benefit was conferred on members of the federal armed forces.

Twenty-three states in 1989 exempted retired state employees from the payment of income taxes on the pension benefits paid to them in a manner similar to the tax scheme of North Carolina. In Davis the United States Supreme Court held that such a tax scheme violates 4 U.S.C. § 111 and is unconstitutional.

Following Davis the General Assembly of this state took several actions. First it repealed the tax exemption for the retirement benefits of state employees retroactive to 1 January 1989 and created a $4,000 exclusion for the retirement benefits of both state and federal employees. N.C.G.S. § 105-134.6(b) (1989). Second, it authorized federal retirees to claim a tax credit for taxes paid in 1988 on their federal pensions. N.C.G.S. § 105-151.20 (1989). Third, it repealed the $1,500.00 deduction for National Guard compensation. 1989 N.C. Sess. Laws, ch. 1002 (1990).

On 17 August 1990 Judge Currin issued an order certifying this as a class action consisting of two different classes: (1) federal pensioners who were denominated the Class A plaintiffs and (2) federal military personnel who were denominated the Class B plaintiffs. On 3 October 1990 Judge Currin allowed the plaintiffs' motion for partial summary judgment and ordered the State to refund to the Class A plaintiffs income taxes paid on their

federal retirement benefits for tax years 1985 through 1988. Judge Currin ordered the State to refund to the Class B plaintiffs all income taxes they had paid for the years 1986 through 1989 as a result of their not being afforded the $1,500.00 exemption which was given to the members of the National Guard. On 18 October 1990 the defendants gave notice of appeal. On 31 December 1990 Judge Currin issued what was denominated an order supplementing the order for partial summary judgment in which he ordered that interest be paid on the refunds from 15 April following the taxable year for which the tax was paid. He also ordered other things not pertinent to this appeal.

The defendants appealed.

CHARLES H. TAYLOR and WOMBLE, CARLYLE, SANDRIDGE & RICE, by G. EUGENE BOYCE, DONALD L. SMITH, JASPER L. CUMMINGS, JR., WALLACE R. YOUNG, JR., and MICHAEL J. NEWMAN, for plaintiff appellees.

LACY H. THORNBURG, Attorney General, by ANDREW A. VANORE, JR., Chief Deputy Attorney General, EDWIN M. SPEAS, JR., Senior Deputy Attorney General, THOMAS F. MOFFITT, Special Deputy Attorney General, MARILYN R. MUDGE, Assistant Attorney General, and DOUGLAS A. JOHNSTON, Assistant Attorney General, for the State appellant.

ROBINSON, BRADSHAW and HINSON, P.A., by JOHN R. WESTER and DAVID C. WRIGHT III, for defendant appellant Helen A. Powers.

WEBB, Justice.

The first question posed by this appeal is whether the rule of Davis is to be applied retroactively. If it is not applied

retroactively the defendants are not liable for refunds to the plaintiffs for taxes paid before Davis was decided on 28 March 1989 on federal pensions or military pay. It is a federal question as to whether the rule is to be applied retroactively. The United States Supreme Court has recognized that in some cases it would be inequitable to apply newly announced rules retroactively if prior to the enunciation of the rules parties had reasonably relied on certain principles in ordering their affairs. In such a case the rule is not applied retroactively.

In Chevron Oil Co. v. Huson, 404 U.S. 97, 30 L.Ed.2d 296 (1971), the United States Supreme Court held that a rule should not be applied retroactively and said that in making this determination three factors should be considered as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . .. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity.

Id. at 106-107, 30 L.Ed.2d at 306.

In applying Chevron to this case we are helped by decisions in Virginia and South Carolina as well as an opinion by

the United States Court of Appeals for the Fourth Circuit. Harper v. Virginia Dept. of Taxation, 241 Va. 232, 401 S.E.2d 868 (1991); Bass v. State, ___ S.C. ___, 395 S.E.2d 171 (1990); Swanson v. Powers, No. 90-1110, filed 25 June 1991. In fact situations very similar to the facts of this case the highest courts of Virginia and South Carolina held that Davis should not be applied retroactively. In Swanson some of the plaintiffs in this case brought a class action against the defendant Powers under 42 U.S.C. § 1983 seeking to hold her personally liable for the $140,000,000.00 they claimed they had overpaid in taxes. The Fourth Circuit Court of Appeals ordered that the case against the defendant Powers be dismissed on the ground she could not reasonably have foreseen the decision in Davis and was immune from being sued.

We examine initially the first prong of Chevron. Davis did not overrule a case but it was a case of first impression. The question then is whether its resolution was clearly foreshadowed. The exemption of state employees from taxation of their pensions had been in effect since 1941. This taxing scheme had received no challenge in court from anyone prior to the decision in Davis. Twenty-three states, including North Carolina, had similar plans. If the decision of Davis had been clearly foreshadowed we do not believe so many states would have adopted such plans. The Fourth Circuit Court of Appeals said "how the intergovernmental tax immunity doctrine and 4 U.S.C. § 111 applied to North Carolina's revenue statutes was anything but clearly established prior to Davis." We agree with the highest courts in Virginia and South Carolina as well as the Fourth Circuit Court of Appeals that the decision of Davis was not clearly foreshadowed. This satisfies the first prong of Chevron.

As to the second prong of Chevron the General Assembly has repealed the provisions of our tax system at which Davis was aimed. The retroactive application of Davis will have no effect on the operation of the principle which Davis would advance. The second prong of Chevron is satisfied.

As to the third prong of Chevron we can take judicial notice of the fact that this State is in dire financial straits. The refunds of taxes, as asked by the plaintiffs, will cost the State approximately $140,000,000.00. This would require a further increase in taxes or a further cut in services by the State. We believe the State acted reasonably under the law as it was then understood when it exempted the benefits of state pensioners from income tax and it excluded part of the pay of National Guardsmen. It would be inequitable to require the State to refund the taxes paid by federal pensioners and military personnel. This satisfies the third prong of Davis.

The plaintiffs contend that James B. Beam Co. v. Georgia, No. 89-680, filed 20 June 1991, and American Trucking Assns. v. Smith, ___ U.S. ___, 110 L.Ed.2d 148 (1990), require that Davis be applied retroactively. Beam involved an action for the refund of taxes paid on alcoholic beverages to the State of Georgia. The United States Supreme Court had held that a similar Hawaiian tax statute violated the Commerce Clause of the United States Constitution. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 82 L.Ed. 2d 200 (1984). The United States Supreme Court held in Beam that the rule of Bacchus should be applied retroactively. In a plurality opinion Justice Souter said that because the judgment in Bacchus applied retroactively in that case, stare decisis required that it be so applied in all similar cases. For this reason Chevron did not apply in Beam. The rule of Chevron was not otherwise altered by Justice Souter's opinion and four other Justices affirmed their belief in the viability of the rule of Chevron.

This case is distinguishable from Beam in that the Court in Davis did not pass on the question of retroactivity. Michigan conceded that a refund was appropriate and the United States Supreme Court was not faced with the question of the retroactivity of the rule. In order for a case to be precedent for another case the court in the first case must pass on the issue presented in the second case. United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 97 L.Ed. 54 (1952); United States v. Mitchell, 271

U.S 9, 70 L.Ed. 799 (1926). The question of retroactivity was not determined in Davis and it may be determined in this case.

American Trucking dealt with the constitutionality of taxes imposed on trucks by the State of Arkansas. In a plurality opinion the United States Supreme Court held that pursuant to the rule of Chevron, American Trucking Assns. v. Scheiner, 483 U.S. 266, 97 L.Ed.2d 226 (1987), which held unconstitutional a similar tax by the State of Pennsylvania should not be given retroactive effect. Four justices dissented. In the dissenting opinion it was said that the Arkansas taxpayers were entitled to have the statute imposing the tax held to be unconstitutional. They said that the remedies to be granted depended on state law which had to comply with the United States Constitution. One justice concurred in an opinion which was not favorable to the application of the Chevron rule.

We might conclude from American Trucking that a majority of the Supreme Court is moving away from the nonretroactive application of constitutional decisions. We do not believe we should so conclude. In Beam the Court had an opportunity to say that the rule of Chevron should no longer be applied in civil cases and declined to do so. We do not believe we should anticipate a change in the law by the United States Supreme Court, but should adhere to the opinions as they are now written. We believe we have done so.

We are aware that the United States Supreme Court has vacated the judgments in the Virginia and South Carolina cases of Harper and Bass and remanded for further consideration in light of Beam. We believe Beam is clearly distinguishable from this case.

The plaintiffs argue that the defendants did not plead the Chevron rule as an affirmative defense and did not argue it in the superior court. For these reasons, say the plaintiffs, the defendants cannot ask this Court to apply the rule.

An affirmative defense normally consists of new matter which the pleader contends will avoid the adverse party's claim regardless of whether the facts alleged by the adverse party may be proved. N.C.G.S. § 1A-1, Rule 8(c) (1990). Roberts v. Heffner, 51 N.C. App. 646, 277 S.E.2d 446 (1981). It may be that rather than new matter constituting an affirmative defense the rule of Chevron is simply a part of the body of law governing the determination as to whether the plaintiffs are entitled to a refund.

We do not have to determine whether the rule of Chevron must be pled as an affirmative defense. If it is necessary the defendants did so in their ninth defense which was as follows:

> Retrospective relief is inappropriate for the reason that the acts complained of were performed in conformity with law as it then existed and the funds sought to be recovered were expended in the performance of governmental functions for the benefit of the citizens of this State, including plaintiffs.

By pleading no retroactive relief under Davis the defendants invoked the rule of Chevron.

The plaintiffs, relying on River Birch Associates v. City of Raleigh, 326 N.C. 100, 388 S.E.2d 538 (1990), State v. Madric, 328 N.C. 223, 400 S.E.2d 31 (1991) and Greene v. Spivey, 236 N.C. 435, 73 S.E.2d 488 (1953), also say that the defendants did not argue the rule of Chevron in the superior court and for that reason cannot argue it on appeal. If the rule of Chevron is part of the law governing the right of plaintiffs to a refund and not new matter which must be pled as an affirmative defense the defendants argued it to the superior court when they argued the plaintiffs were not entitled to a refund. If it is new matter which must be pled the defendants sufficiently alerted the superior court to this new matter by their ninth defense.

The plaintiffs also argue that the defendants have waived the right not to apply Davis retroactively because refunds have been made to some federal pensioners. They say that by intentionally making some refunds they have waived the right to assert the Chevron defense on appeal. N.C. Const. art. V, § 2(1) provides:

> The power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended, or contracted away.

It is very difficult under this section for the State to waive its right to collect taxes. In Henderson v. Gill, Comr. of Revenue, 229 N.C. 313, 49 S.E.2d 754 (1948), an agent of the Revenue Department advised the taxpayer how sales taxes were to be reported for the sale of floral products. The taxpayer reported his taxes as he had been advised to do by the agent. The taxpayer was assessed for additional taxes. He asserted that the State was estopped from claiming these additional taxes because he had relied on the agent's instruction and had not collected sales taxes from customers as he could have done if he had been properly instructed by the agent. This Court held that the State was not estopped. We said, "the State cannot, by the conduct of its agents be estopped from collecting taxes lawfully imposed and remaining unpaid." Id. at 316, 49 S.E.2d at 756.

We hold that the State has not waived its right to refuse a refund of these taxes.

The plaintiffs argue that regardless of whether the Chevron test is applied they are entitled to refunds under our statutes that allow them to sue for refunds. A refund under our statutes might be appropriate if the taxes were improperly collected. If Davis is applied only prospectively under Chevron the taxes were properly collected and no refund is due under our statutes or otherwise.

We have held that Davis does not apply retroactively. For that reason the plaintiffs are not entitled to refunds and we do not consider the question of whether this case was properly held to be a class action. We also do not consider what remedies would be available to the plaintiffs in the event Davis should be held to apply retroactively and whether such remedies comply with due process of law. See McKesson v. Division of Alc. Bev., ___ U.S. ____, 110 L.Ed 2d 17 (1990).

For the reasons stated in this opinion we reverse and remand to the Superior Court of Wake County for the entry of a judgment dismissing the action.

REVERSED AND REMANDED.

No. 64PA91 - Swanson & Berry v. State
[Filed: August 14, 1991]
MITCHELL, J., dissenting.

I am convinced that the rule announced by the Supreme Court of the United States in Davis v. Michigan Dept. of Treasury, 489 U.S. 803; 103 L.Ed.2d 891 (1989) must be applied retroactively, and that the majority errs in holding to the contrary. In Davis, the Supreme Court held that a scheme of taxation, exempting the pensions of retired state employees from state taxation while not exempting pensions of retired federal employees similarly situated, violates 4 U.S.C. § 111 and the constitutional doctrine of intergovernmental tax immunity. I believe that decision is fully retroactive and is the controlling precedent which must be applied in this case.

Assuming arguendo that the Chevron test is still valid, three factors must be considered in determining whether a constitutional ruling by the Supreme Court of the United States in a civil case will be applied retroactively. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107, 30 L. Ed. 2d 296, 306 (1971). In

the present case, all of those factors weigh in favor of retroactive application of Davis.

The first factor to be considered under Chevron is whether the decision to be applied has established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." Id. at 106, 30 L. Ed. 2d at 306. Clearly, the Supreme Court's decision in Davis did not overrule any past precedent.

Further, the majority in Davis seems to have felt that its holding there -- that imposing state taxes upon the pensions of federal retirees but not upon the pensions of similarly situated state retirees was unconstitutional -- had been clearly foreshadowed under the constitutional doctrine of intergovernmental tax immunity. See Davis, 489 U.S. 803, 103 L.Ed.2d 891.

The second factor under Chevron requires a consideration of the prior history of the rule announced by the Supreme Court, its purpose and effect, and whether retroactive application will further or retard the operation of the rule. Chevron, 404 U.S. 106-107, 30 L.Ed.2d 306. Unlike my colleagues, I believe that retroactive application of the rule announced in Davis will further the operation of that rule. Surely, requiring the State to return money it has collected from one class of taxpayers in a discriminatory and unconstitutional manner will further the operation of the rule announced in Davis declaring that the very conduct engaged in by the State violates the Constitution of the United States.

The third and final factor to be considered under Chevron is whether retroactive application of the Supreme Court decision in question will produce "inequitable results." Id. at 107, 30 L.Ed.2d at 306. As to this factor, my colleagues take judicial notice of the fact that the State of North Carolina is currently experiencing hard financial times. For that reason, they conclude

that it would be "inequitable" to require the State to refund the taxes it has unconstitutionally taken from the plaintiffs under color of state law.

I am unable to see the "inequity" involved in requiring the State to return any money it has unconstitutionally taken from the plaintiffs. In my view, the fact that the State is experiencing financial difficulties has little to do with whether it would be inequitable to require the State to refund the plaintiffs' money. Nothing in the record before us indicates that the plaintiffs, federal pensioners and military personnel, are experiencing any less financial difficulties than the State of North Carolina. Further, unlike the State, the plaintiffs do not have the power of taxation at their disposal when attempting to deal with their financial difficulties. There simply is nothing "inequitable" or wrong about ordering that the State not pick a taxpayer's pocket or in requiring it to return the money when it is caught doing so. I believe it is entirely equitable and just to apply the rule announced in Davis retroactively so as to require that the State return any taxes it has unconstitutionally collected from the plaintiffs.

For the foregoing reasons, I believe that all three factors to be considered under the Chevron test weigh heavily in favor of the plaintiffs and against the defendants. Therefore, if the Chevron test is still valid, Davis must be applied retroactively.

I note, however, that the continuing viability of the Chevron test has been brought into question by the decision of the Supreme Court of the United States in James B. Beam Co. v. Georgia, ___ U.S. ___, ___ L.Ed.2d ___ (1991). Nevertheless, I am convinced that, even if the Chevron test has been abandoned, the rule announced in Davis must be given fully retroactive application for whichever of the several reasons set forth by the various Justices in Beam ultimately prevails in the Supreme Court of the United States. See generally, Beam, Id.

The plaintiffs here must receive the full benefit of the rule set forth in Davis, just as the plaintiffs in that case did. Therefore, I believe that the plaintiff taxpayers are entitled to have the Constitution of the United States, as interpreted by the Supreme Court of the United States in Davis, applied to this case. I respectfully dissent from the decision of the majority to the contrary.

[Chief Justice Exum and Justice Frye join in this dissenting opinion.]

APPENDIX D

IN THE SUPREME COURT OF NORTH CAROLINA

NORMAN W. SWANSON, et al., Class A Plaintiffs, CHARLES L. BERRY, et al., Class B Plaintiffs, vs. THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE STATE OF NORTH CAROLINA, Defendants.	[Filed December 6, 1991] In the Office of Clerk Supreme Court of North Carolina No. 64PA91-Wake

Hearing on order granting plaintiffs' motion to rehear the opinion rendered in this case at 329 N.C. 576, 407 S.E.2d 791 (1991).

CHARLES H. TAYLOR and WOMBLE, CARLYLE, SANDRIDGE & RICE, by G. EUGENE BOYCE, DONALD L. SMITH, JASPER L. CUMMINGS, JR., WALLACE R. YOUNG, JR., and MICHAEL J. NEWMAN, for plaintiff appellees.

LACY H. THORNBURG, Attorney General, by ANDREW A. VANORE, JR., Chief Deputy Attorney

General, EDWIN M. SPEAS, JR., Senior Deputy Attorney General, THOMAS F. MOFFITT, Special Deputy Attorney General, MARILYN R. MUDGE, Assistant Attorney General, and DOUGLAS A. JOHNSTON, Assistant Attorney General, for the State appellant.

ROBINSON, BRADSHAW and HINSON, P.A., by JOHN R. WESTER and DAVID C. WRIGHT III, for defendant appellant Helen A. Powers.

WEBB, Justice.

We have granted the plaintiffs' petition for rehearing in order to answer some of the claims made by the plaintiffs in the petition. The plaintiffs say, in their petition for rehearing, that the matter passed on in superior court was a motion for partial summary judgment which dealt only with claims under the Constitution of the United States. They say that they have alleged claims under the Constitution of North Carolina which have not been determined in the superior court and ask that the case be remanded to determine those claims.

We hold that the order entered by the superior court from which the appeal was taken was not for partial summary judgment. It was entitled motion for partial summary judgment but the motion said:

> Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, Plaintiffs move this Court to enter an order granting summary judgment in favor of Class A Plaintiffs on their claims for refunds of taxes unlawfully collected from them for tax years 1985 through 1988 and in favor of Class B Plaintiffs on their claims for refunds of taxes unlawfully collected from them for tax years 1986 through 1989.

Nowhere in this motion do the plaintiffs limit it to their claims under the United States Constitution. The order granting the motion is entitled "Partial Summary Judgment" but it does not limit the order to claims under the United States Constitution. After reciting that there is no genuine issue of a material fact and that the plaintiffs are entitled to judgment as a matter of law, the superior court ordered a refund of taxes to both classes of plaintiffs. If we were to say the order should be limited to either federal or state claims, there is no way of determining from the motion or the order to which type of claim it should be limited. We hold the superior court passed on all claims. The State in its brief argues all the claims.

Both classes of plaintiffs alleged that the collection of the taxes deprived them of due process and equal protection of the laws guaranteed them by N.C. Const. art. I, § 19, as well as the constitutional right to uniformity in taxation guaranteed to them by N.C. Const. art. V, § 2, and the right against the taxing of acts previously done guaranteed by N.C. Const. art. I, § 16.

In order to withstand a challenge to an act of the General Assembly on the ground it violates the law of the land clause of N.C. Const. art. I, § 19, which is comparable to the due process clause of the federal constitution, the act of the General Assembly must have a rational relation to a valid state objective. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976). The provision of pensions for retired state employees and the payment to members of the National Guard are valid state objectives. The exemption from taxation for these two remunerations has a rational relation to each of them. The granting of these exemptions does not violate the law of the land clause of N.C. Const. art. I, § 19.

We are not certain that N.C. Const. art. V, § 2 has any application to this case. It deals principally with taxation of property. Its only reference to income taxes is contained in the following sentence, "[t]he rate of tax on incomes shall not in any case exceed ten percent, and there shall be allowed personal

exemptions and deductions so that only net incomes are taxed." N.C. Const. art. V, § 2(6).

Assuming N.C. Const. art. V, § 2 applies, we believe the resolution of whether it prohibits the tax on the plaintiffs in this case presents the same question as is presented by the equal protection clause of N.C. Const. art. I, § 19. The General Assembly created a class composed of retired state employees and a class composed of members of the National Guard. Each of these classes received favorable treatment under the income tax laws of this state. The question is whether these two classifications are reasonable and not arbitrary. Neither class of plaintiffs is a suspect class and the test as to arbitrariness is whether the distinctions drawn for retired state employees and members of the National Guard bear some relationship to a conceivable legitimate governmental interest. Texfi Industries v. City of Fayetteville, 301 N.C. 1, 269 S.E.2d 142 (1980); Leonard v. Maxwell, Comr. of Revenue, 216 N.C. 39, 3 S.E.2d 316, app. dismd., 308 U.S. 516, 84 L.Ed. 439 (1939). The providing of compensation for retired state employees and members of the National Guard is a legitimate governmental interest. The exemption of a part or all of this compensation from taxation has some relation to this governmental interest. These exemptions do not violate the equal protection clause of N.C Const. art. I, § 19, or art. V, § 2.

The plaintiffs also contend that the tax imposed on them violates N.C. Const. art. I, § 16, which provides in part: "[n]o law taxing retrospectively . . . acts previously done shall be enacted." The taxes on the Class B plaintiffs were imposed on income in the years it was received. It was not imposed on acts previously done.

The taxes imposed on federal retirees were not taxes on acts previously done. The taxes were imposed on income which was received in the years the taxes were collected. The fact that the pensions of the federal retirees were based on wages previously

earned does not make the tax retrospective. A statute is not unconstitutionally retroactive merely because it operates on facts which were in existence before its enactment. See Smith v. American and Efird Mills, 305 N.C. 507, 290 S.E.2d 634 (1982) and Wood v. Stevens and Co., 297 N.C. 636, 256 S.E.2d 692 (1979).

With the addition of this opinion, we reaffirm the opinion previously entered. We reverse and remand to the Superior Court, Wake County for the entry of judgment dismissing the action.

REVERSED AND REMANDED.

No. 64PA91 - Swanson v. State of North Carolina
[Filed December 6, 1991]

Chief Justice EXUM dissenting.

I joined in Justice Mitchell's original dissenting opinion because I think, and continue to think, that Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891 (1989), is retroactive and plaintiffs are entitled to its benefits. That was the only issue addressed by the majority in its original opinion.

On plaintiffs' petition for rehearing the majority has elected to address certain state constitutional issues which plaintiffs contend were never ruled on by the trial court. It is not clear from the record on appeal that the state constitutional issues were addressed and decided by the trial court. If the trial court determined the case solely on the basis of the retroactivity of Davis, its order would not necessarily have been written differently. The trial court would have necessarily considered the state constitutional claims only if it had rejected plaintiffs' federal law claims. It is clear that the state law claims were neither briefed nor argued by plaintiffs on the original appeal. Neither side addressed these points in its oral presentation to the Court.

Under these circumstances I think it inappropriate for the Court to address them now on plaintiffs' petition for rehearing.

I would either remand the case for determination of the state constitutional questions as plaintiffs have prayed or order a reargument and new briefing on the state constitutional issues.

I take this opportunity also to say that I have real doubt as to whether plaintiffs have followed proper statutory procedures and it may be that ultimately, their claims will be barred on procedural grounds. See Bailey v. State of North Carolina, ___ N.C. ___, ___ S.E.2d ___ (No. 1OSPA9l, filed 6 December 1991). Since the majority has not chosen to address this aspect of the case, I, too, will leave it for another day.

No. 64PA9l - Swanson v. State of North Carolina Justice
[Filed: December 6, 1991]

Justice MITCHELL dissenting.

For reasons fully explained in my dissent from the previous decision and opinion of the majority of this Court in this case, I continue to believe that Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 103 L. Ed. 2d 891 (1989) is fully retroactive and that the taxpayer-plaintiffs are entitled to its benefits. Swanson v. State of North Carolina, 329 N.C. 576, 586-89, 407 S.E.2d 791, 796-97 (1991) (Mitchell, J., dissenting, joined by Exum, C.J., and Frye, J.). For that reason, I continue to dissent from the result reached by the majority.

[Justice FRYE joins in this dissenting opinion.]

APPENDIX E

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY — 90 CVS 3127

NORMAN W. SWANSON, et al, individually and for the benefit and on behalf of all others similarly situated,

Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER and PAUL H. TURNEY,

Class B Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually as Secretary of the North Carolina Department of Revenue, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, Treasurer of The State OF North Carolina,

Defendants.

EX PARTE ORDER OF CONDITIONAL CLASS CERTIFICATION

[Filed: April 11, 1990]

This matter is before the Court upon the motion of Plaintiffs pursuant to N. C. Gen. Stat. § 1A-1, Rule 23 for a certification of the above-styled action as a class action for the sole purpose of giving any

notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds as required N.C. Gen. Stat. chap. 105. Based on the allegations set forth in the Plaintiffs' Complaint and after considering arguments of counsel, this Court is of the opinion that good cause exists for granting the instant motion.

IT IS THEREFORE ORDERED that:

1. The above-styled action be certified as a class action for the sole purpose of giving any notice to the North Carolina Department of revenue that may be required to obtain income tax refunds and required by N.C. Gen. Stat. chap. 105.

This the *11th* day of April, 1990.

/s/ SAMUEL T. CURRIN
Presiding Judge of the Superior Court

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY — 90 CVS 03127

NORMAN W. SWANSON, et al,

Class A Plaintiffs,

CHARLES L. BERRY, et al,

Class B Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually Betsy Y. Justus as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Defendants.

ORDER OF CLASS CERTIFICATION

[Filed: August 17, 1990]

This matter is before the Court on Plaintiffs' Motion and supporting Memorandum for Class Certification pursuant to Rule 23 of the North Carolina Rules of Civil Procedure. In their Motion, Plaintiffs request specifically that this Court enter an order (1) certifying this action as a class action, (2) declaring that Plaintiffs' class demand letters for refunds, dated 14 and 18 April 1989, 12 March and 12 April 1990 constituted effective refund demands for preserving the rights to tax refunds of all named and unnamed class members, (3) declaring Plaintiffs' class demand letters serve as a toll to any statute of limitations to be determined

applicable and were in compliance with any lawful conditions precedent to reimbursement of taxes unlawfully collected, and (4) requiring Defendants to provide specific identification of all members of Plaintiff Classes A and B within a reasonable time period to be determined by this Court.

After carefully considering the arguments of counsel made in open court before the undersigned on August 10, 1990 and after carefully considering Plaintiffs' Memorandum and evidentiary materials, including affidavits, filed in support thereof and Defendants' Opposition Memorandum and after reviewing the applicable statutory and case law, this Court finds that the members of Class A and B Plaintiffs have interests in common questions of law and fact and that they are so numerous as to make it impracticable to bring them all before the Court. This Court further finds and concludes that the Plaintiffs have met the prerequisites for class certification under Rule 23 and applicable case law and that good cause exists for granting Plaintiffs' Motion.

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion for Class Certification be GRANTED, and that:

1. Class Definition. The Plaintiff classes shall consist of all those individuals who:

Class A - Federal Retirees

a. have been former employees (or beneficiaries, survivors, etc., of former employees) of the federal government, including any branch, department or agency thereof and who received federal retirement pension benefits either on account of their own employment relationship with the federal government or that of the person with respect to whom they are a beneficiary, survivor, etc.; and

b. paid or pay income tax to the State of North Carolina on their federal retirement pension benefits for tax years 1985 and thereafter, or who will be required to pay such tax on such benefits in the future.

Class B - Federal Active Duty Military and Reserve Personnel

a. in the current tax year and in tax years prior hereto have been employees of the federal government as federal active duty military and reservist personnel (or beneficiaries, survivors, etc., of such employees) and were and are entitled to receive federal compensation through tax years 1986 through 1989 inclusive; and

b. have been and are required by Defendants to pay income tax to the state of North Carolina on their federal compensation benefits during such years and who will be required to so pay in the future.

2. Class Refund Demands Effective for All Class Members. Plaintiffs' Class Demand Letters for Tax Refunds, dated 14 and 18 April 1989, 12 March 1990 and 12 April 1990, made pursuant to the 14 April 1989 Order of Conditional Class Certification entered by U.S. District Court Judge F. T. Dupree, Jr. and the 11 April 1990 Order of Conditional Class Certification entered by this Court, constituted effective demand for refund on behalf of all named and unnamed class members and preserved their rights to claim and seek refunds of all taxes unlawfully imposed and collected due to inclusion of federal compensation and retirement pay in their incomes.

3. Class Refund Demands Toll Statute of Limitations. Plaintiffs' Class Demand Letters referred to above serve as a toll

to any statute of limitations to be determined applicable to all named and unnamed class members and constituted sufficient compliance with any lawful procedural conditions precedent pertaining to the form required for refund demands of taxes unlawfully imposed and collected due to inclusion of federal compensation and retirement pay in their incomes.

4. Identification of Class Members. Defendants shall provide to Plaintiff class counsel complete identification of all members of Plaintiff Classes A and B, including names and addresses, within a reasonable time period to be agreed upon by counsel. Plaintiffs' class counsel shall report in writing to the undersigned on the status of Defendants' identification process no later than 17 August 1990. Defendants' obligation to provide identification of all Plaintiff class members is continuing in nature until final disposition of this action and it shall be incumbent upon Defendants to obtain specific identification of Plaintiff class members and make the same available to Plaintiffs' class counsel as soon as practicably possible.

5. Notice. The members of the class shall receive the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the Court will exclude the member from the class if the member so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

The parties are directed to confer with each other and attempt to stipulate as to the exact terms of the proposed notice and the method by which the notice is to be given. The parties are further directed to submit their agreement to the undersigned no later than 31 August 1990. If the parties cannot agree either on the terms of a proposed notice or on the method by which the notice

is to be given, they are directed to submit separate notice proposals, provided, however, that the manner and form of notice shall be subject to prior approval of the Court.

6. Class Counsel. Subject to further order of the Court, G. Eugene Boyce, Donald L. Smith and Wallace R. Young, Jr., of Womble Carlyle Sandridge & Rice, Post Office Box 831, Raleigh, North Carolina 27602 and Charles H. Taylor, Attorney at Law, 4295 Shattalon Drive, Winston-Salem, North Carolina 27106 are designated as counsel for the Plaintiff class members.

7. The undersigned Superior Court Judge, with consent of the parties, shall retain jurisdiction for future proceedings of this class action.

With consent of the parties, given in open court, this Order may be signed out of court, out of session and out of county, if necessary.

This the *17th* day of August, 1990.

/s/ SAMUEL T. CURRIN
Superior Court Judge

APPENDIX F

UNITED STATES DISTRICT COURT
Eastern District of North Carolina
Raleigh Division
Case No. 89-282-CIV5-H

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM Z. NICHOLSON, III, CHARLES L. DANCEY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR. MRS. GALENA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, individually and for the benefit and on behalf of all other similarly situated,

Plaintiffs,

vs.

HELEN A. POWERS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLON BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,

Defendants.

ORDER

[Filed April 14, 1989]

This matter is before the court upon the motion of Plaintiffs pursuant to Rule 23 of the Federal Rules of Civil Procedure for a certification of the above-styled action as a class action for the sole purpose of giving any notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds as required by G.S. § 105. Based on the allegations set forth in the Plaintiff's Complaint and after considering arguments of counsel, this court is of the opinion that good cause exists for granting the instant motion.

IT IS THEREFORE ORDERED that:

1. The above-styled action be certified as a class action for the sole purpose of giving any notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds and required by G.S. § 105 of the North Carolina General Statutes.

This the 14th day of April, 1989.

/s/ F.T. Dupree, Jr.
F.T. DUPREE, JR.
Senior U.S. District Court Judge

UNITED STATES DISTRICT COURT
Eastern District of North Carolina
Raleigh Division
Case No. 89-282-CIV-5-H

NORMAN W. SWANSON, et al., individually and for the benefit and on behalf of all other similarly situated,	)	
Plaintiffs,	)	
vs.	)	ORDER
HELEN A. POWERS, Individually as Secretary OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,	)	[Filed: July 24, 1989 J. Rich Leonard, Clerk U.S. District Court E. Dist. No. Car.]
Defendants.	)	

This matter is before the Court on Plaintiffs' Motion and supporting Memorandum for Class Certification pursuant to Rule 23 of the Federal Rules of Civil Procedure. After Carefully considering the Plaintiffs' Memorandum and class representation allegations as set out in their Complaint and Amended Complaint, and after reviewing the applicable statutory and case law, and for good cause shown, this Court finds that Plaintiffs have met the prerequisites for class certification under of Rule 23 of the Federal Rules of Evidence. Further, counsel for the Defendants have no objection to the granting of Plaintiffs' Motion for Class Certification.

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion for Class Certification be GRANTED.

The Plaintiff class shall consist of all those individuals who:

a. have been former employees (or beneficiaries, survivors, etc., of former employees) of the federal government, including any branch, department or agency thereof and who were or are entitled to receive federal retirement pension benefits either on account of their own employment relationship with the federal government or that of the person with respect to whom they are a beneficiary, survivor, etc.; and

b. paid or pay income tax to the State of North Carolina on their federal retirement pension benefits, or who will be required to pay such tax on such benefits in the future.

The members of the class shall receive the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the Court will exclude the member from the class if the member so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

The parties are directed to confer with each other and attempt to stipulate as to the exact terms of the proposed notice and the method by which the notice is to be given. The parties are further directed to submit their agreement to the Court within thirty (30) days of this Order. If the parties cannot agree either on the terms of a proposed notice or on the method by which the notice

is to be given, they are directed to submit separate notice proposals.

This the 24th day of July, 1989.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Court Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 89-282-CIV-5-H

NORMAN W. SWANSON, *et al.*,
Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER, and PAUL H. TURNEY,
Class B Plaintiffs,

v.

HELEN A. POWERS, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE, and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,
Defendants.

ORDER

[Filed August 16, 1990]

This matter is before the court on the defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to Fed. R. Civ. P. 12(b) (1) and 12(b) (6). For the reasons discussed below, the court grants the motion in part and denies it in part.

FACTS

The Class A Plaintiffs are retired federal employees who challenge former North Carolina income tax laws that treated the income of retired federal employees less favorably than the income of retired state employees. Federal retirement income was subject to a partial exemption, but state retirement income was exempted completely. This taxing scheme is indistinguishable from that struck down by the Supreme Court in *Davis v. Michigan Dep't of Treasury*, ____ U.S. ____, 109 S. Ct. 1500, 103 L.Ed.2d 891 (1989), under 4 U.S.C. § 111 and the principle of intergovernmental tax immunity. The plaintiffs allege that the state's administration of its income tax laws deprive them of their civil rights in violation of 42 U.S.C. § 1983, 4 U.S.C. § 111, and the equal protection and due process clauses of the United States Constitution.

Class B plaintiffs are active-duty military personnel and reservists who challenge the statutory $1500 annual income tax exclusion for compensation paid to members of the North Carolina National Guard. Both classes seek damages in the form of refunds, a declaration that the collection of tax on such income violates federal law, and an injunction barring the defendants from collecting such taxes in the future.

The defendants have filed this motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. The parties have extensively briefed the issues, and the court has conducted a lengthy hearing. Accordingly, the motion is ripe for ruling.

DECISION

I. *The Tax Injunction Act*

The defendants contend that this action is barred by the Tax Injunction Act of 1937, 28 U.S.C. § 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

This statute applies to requests for declaratory relief, injunctive relief, and damages. *See California v. Grace Brethren Church*, 457 U.S. 393, 102 S. Ct. 2498, 73 L.Ed.2d 93 (1982); *Moss v. Georgia*, 655 F.2d 668 (5th Cir. 1981). The plaintiffs invoke the federal instrumentalities exception to the Tax Injunction Act. Alternatively, the plaintiffs contend that the state remedy is not plain, speedy, and efficient.

Under the federal instrumentalities exception, the Tax Injunction Act does not bar actions in which the United States or one of its instrumentalities is the plaintiff. *See, e.g., Dep't of Employment v. United States*, 385 U.S. 355, 87 S. Ct. 464, 17 L.Ed.2d 414 (1966). The parties have cited to the court no federal cases holding that employees are or are not instrumentalities. The plaintiffs rely on language in *Davis* tracing the development of the right of federal employees to invoke the doctrine of intergovernmental tax immunity. The plaintiffs argue that under *Davis* the definition of a federal instrumentality is co-extensive with taxpayers protected by intergovernmental tax immunity and 4 U.S.C. § 111.

The court finds, however, that federal employees are not federal instrumentalities exempted from the Tax Injunction Act. *Davis*, which began in the Michigan state courts, does not address the applicability of the Tax Injunction Act. The Court did, as the plaintiffs suggest, outline the development of the taxation of the employees of one sovereign by another. In so doing, the Court stated that 4 U.S.C. § 111 codified *Graves v. New York*, 306 U.S. 466, 59 S. Ct. 595, 83 L.Ed. 927 (1939). It is clear from *Graves* that federal employees were exempt from state taxation not because they were federal instrumentalities, but because they were

employees of instrumentalities. 306 U.S. at 483 n.2, 485. *See also New York v. Graves*, 299 U.S. 401, 408, 57 S. Ct. 269, 272, 81 L.Ed. 306 (1937).1

Because intergovernmental tax immunity cases draw a definitional distinction between instrumentalities and their employees, the court concludes that a similar distinction exists under the Tax Injunction Act. This conclusion is supported by the fact that all cases applying the instrumentalities exception involve entities that are clearly distinguishable from the individual plaintiffs in this action. *See, e.g., Dep't of Employment*, 385 U.S. at 359; *Federal Reserve Bank v. Comm'r of Corporations and Taxation*, 499 F.2d 60 (1st Cir. 1974); *Federal Land Bank v. Bd. of County Comm'rs*, 582 F.Supp. 1507 (D.Colo. 1984); *First Nat'l Bank v. Dickinson*, 291 F.Supp. 855 (N.D.Fla. 1968), *affirmed*, 393 U.S. 409, 89 S. Ct. 685, 21 L.Ed.2d 634 (1969). Moreover, several identical actions brought in federal court by federal employees have been dismissed pursuant to the Tax Injunction Act. *Waldron v. Collins*, 788 F.2d 736 (11th Cir.), *cert. denied*, 479 U.S. 884, 107 S. Ct. 274,93 L.Ed.2d 250 (1986); *Todd v. Johnson*, 718 F.Supp. 1305 (S.D. Miss. 1989); *Melof v. Hunt*, 718 F.2d 877 (M.D.Ala. 1989).2 Accordingly, the court finds that the plaintiffs are not federal instrumentalities exempted from the Tax Injunction Act.

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[1] In *United States v. New Mexico*, 455 U.S. 720, 102 S. Ct. 1373, 71 L.Ed.2d 550 (1982), the Court held that independent contractors are not federal instrumentalities protected by the doctrine of intergovernmental tax immunity. The Court drew a distinction between independent contractors and employees, whom the court described as "constituent parts" of the United States. *New Mexico*, 455 U.S. at 740, 102 S. Ct. at 1386. A possible interpretation of this case is that employees are instrumentalities. However, this case did not involve the Tax Injunction Act; rather, it seems to be consistent with the prior line of cases holding that federal employees are protected by intergovernmental tax immunity because they are employees of instrumentalities, not because they are themselves instrumentalities.

[2] None of these cases specifically addressed the federal instrumentalities exception.

The court finds, however, that the state remedy is not plain, speedy, and efficient. A plain, speedy, and efficient remedy is one that provides a taxpayer with a full hearing and judicial determination at which he or she may raise any and all constitutional objections. *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 513, 101 S. Ct. 1221, 67 L.Ed.2d 464 (1981). The state remedy does not have to be equal to the federal remedy. *Ayers v. Polk County*, 697 F.2d 1375, 1377 (11th Cir. 1983). A state remedy is inadequate, however, if some "uncertainty" surrounds it. *Rosewell*, 450 U.S. at 516-17. The plaintiffs contend that the defendants have so confused the state remedy that it is impossible to enforce the plaintiffs' federal rights in state court.

The uncertainty surrounds the statute of limitations. The defendants contend that the plaintiffs' state remedy is governed by N.C. Gen. Stat. § 105-267, which provides that a taxpayer contesting the illegality of a tax must pay the tax and then file a written demand for refund within 30 days. If the refund is denied, the taxpayer has three years to file an action in the Superior Court of Wake County or the county of the taxpayer's residence. On its face, this remedy is plain, speedy, and efficient. *See Grace Brethren Church*, 457 U.S. at 412.

Confusion arises, however, out of the existence of N.C. Gen. Stat. § 266.1, which provides that taxpayers may file for refunds for mathematical or other errors within three years of payment. If no refund is given, the taxpayer has 90 days to file an action in the Superior Court of Wake County or the county of residence. The two statutes address different situations. Section 267 provides a remedy by which to contest illegal or unconstitutional taxes; section 266.1 provides a remedy by which to receive refunds for overpayment caused by mathematical or other errors. *Coca-Cola Co. v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977).

This remedy is uncertain because of the conduct of the individual defendants and the Department of Revenue. All interpretation and explanation of these statutes provided to taxpayers by the defendants indicated that *any* request for refund may be made within three years of payment. This information was provided in "Individual Tax Income Bulletins" published by the Department of Revenue. Plaintiffs' Memorandum, Exhibit 2. The defendants' instruction booklets are to the same effect. Moreover, after *Davis* was decided, the Department of Revenue announced publicly that refunds of taxes paid within three years would be allowed under the customary practice. Plaintiffs' Memorandum, Exhibits 33,34. Taxpayers were not told of the 30-day rule until four days before the filing deadline for 1989, well after many of the plaintiffs had filed their returns.

The defendants, soon after the filing of 1989 tax returns, began denying *Davis* refund requests pursuant to the 30-day statute of limitations of section 267. They also raise this statute as a defense in related state court litigation and in this action. The defendants have thereby deprived the plaintiffs a full hearing and judicial determination of their claims. *Rosewell*, 450 U.S. at 513.

A further complication is that the defendants cannot administer the 30-day rule. The defendants do not date-stamp returns filed prior to the deadline. The defendants assume that the date the return is signed is the date of payment, regardless of when the return was filed. Therefore, those plaintiffs filing their returns more than 30 days after signing the returns never had the opportunity to file a claim.

The state remedy is also inadequate because it does not provide for a class action, thereby requiring individual litigation of thousands of refund claims. Each of the claims is small enough to make the cost of such litigation prohibitive. The plaintiffs estimate that Class A contains 89,111 members and that Class B contains 49,486 members. (Exhibits 10, 11, and 12). At the hearing, plaintiffs' counsel estimated the average refund to be approximately

$700. Some courts have held that the unavailability of class actions does not in itself render the state remedy inadequate. *See, e.g., Waldron*, 788 F.2d at 738. The court finds, however, that the absence of a class action procedure may be considered along with all other facts in determining whether the state remedy is adequate for purposes of the Tax Injunction Act.

The remedy provided by the state to the Class A Plaintiffs is the recently-enacted N.C. Gen. Stat. § 105-151.20. Pursuant to this statute, federal retirees who paid state income tax on federal retirement income for the taxable year 1988 may claim a tax credit in that amount in equal installments over a three-year period beginning with the taxable year 1990. This remedy is inadequate because it fails to take into account the time value of the plaintiff's money. The state is in essence admitting that the tax was improper, but some of the money will not be returned until five years after payment.3 Furthermore, given that these plaintiffs are retirees, it is reasonable to assume that a certain number of them will die in the next three years and will never receive their money. Others may have no tax liability from 1990-1992 and so will be unable to use the credit. In reality, this remedy provides the class with only a partial refund. *See Georgia Railroad & Banking Co. v. Redwine*, 342 U.S. 299, 303, 72 S. Ct. 321, 324, 96 L.Ed.2d 335 (1952) (remedy is inadequate if only partial refund will be

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[3] The Court in *Rosewell* held that the state's failure to pay interest and the unavoidable delay in the litigation process did not prohibit the remedy from being speedy or efficient. 450 U.S. at 517-22, 101 S. Ct. at 1231-33. The defendants, however, are doing more than not paying interest; they are intentionally extending the period for refund through as late as April 15, 1993. This delay is not the unavoidable result of litigation, but is the intentional choice of the state legislature.

recovered).[4] This statute provides no remedy to the Class B plaintiffs.

For the above-stated reasons, the court finds that the state remedy is not plain, speedy, and efficient. *Hillsborough v. Cromwell*, 326 U.S. 620, 624-26, 66 S. Ct. 445, 90 L.Ed. 358 (1946). Therefore, this action is not barred by the Tax Injunction Act.

II. Comity

Since the court has found that the state remedy is not plain, speedy, and efficient for purposes of the Tax Injunction Act, it necessarily follows that the remedy is not plain, adequate, and complete for purposes of comity. *See Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 116, 102 S. Ct. 177, 70 L.Ed.2d 271 (1981). Therefore, comity does not bar the court from exercising jurisdiction over this action.

III. Eleventh Amendment

The plaintiffs' claims for monetary damages in the form of refunds are barred by the eleventh amendment. *Edelman v. Jordon*, 415 U.S. 651, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974). The plaintiffs attempt to characterize their action as one for "equitable restitution." The Supreme Court has stated, however, that plaintiffs may not circumvent the eleventh amendment by characterizing a damages claim as one for equitable restitution. *Edelman*, 94 S. Ct. at 1356. It has long been established that unconstitutional taxes may not be recovered from the state treasury. *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 64

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[4] Furthermore, this legislation, enacted after *Davis*, treats federal retirees differently than other taxpayers in that the retirees must receive their refunds over three years instead of in a lump sum payment. This legislation was enacted after the parties filed their briefs such that the parties have not addressed the issue of whether this remedy is an ongoing constitutional violation. *See* Footnote 5, *infra*.

S. Ct. 873, 88 L.Ed 1121 (1944); *Smith v. Reeves*, 178 U.S. 436, 20 S. Ct. 919, 44 L.Ed. 1140 (1900).

The plaintiffs contend that federal courts may order relief that has some effect on the state treasury. For example, in *Milliken v. Bradley*, 433 U.S. 267, 289, 97 S. Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977), a federal court ordered a state to spend $5.8 million to upgrade its educational system. In *Papasan v. Allain*, 478 U.S. 265, 282, 106 S. Ct. 2932, 2942, 92 L.Ed.2d 209 (1986), the Court distinguished between the expenditure of state funds necessary for future compliance with a court order and awards for accrued monetary liability. A federal court may order the former type of relief, but not the latter. It is clear, however, that the plaintiffs are seeking an award for monetary liability, which is precisely what the eleventh amendment forbids.

The plaintiffs suggest as a possible remedy a tax credit applied to future tax years. Substantively, however, this remedy is still one for accrued monetary liability that would be satisfied out of the general revenues of the state. The plaintiffs cannot avoid the eleventh amendment by receiving their award in the form of future tax credits, rather than present cash payments.

The plaintiffs contend finally that the eleventh amendment does not bar their damages claims because they are federal instrumentalities. *See, e.g., United States v. Mississippi*, 380 U.S. 128, 140-41, 85 S. Ct. 808, 814-15, 13 L.Ed.2d 717 (1965); *FDIC v. New York*, 732 F.Supp. 26 (S.D.N.Y. 1990). The court previously ruled, however, that federal employees are not federal instrumentalities. *Supra*, pp. 3-5. Therefore, the court must dismiss the damages claims against the defendants in their official capacities.[5]

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[5] The eleventh amendment does not bar the damages claims against Powers in her individual capacity. *Scheuer v. Rhodes*, 416 U.S. 232, 237-38, 94 S. Ct. 1683, 1687 (1974). Nor does it bar the claims for injunctive and declaratory relief necessary to correct an ongoing constitutional violation. *Green v. Mansour*,

IV. Powers' Qualified Immunity

The defendant Powers contends that she is protected from the damages claims by the doctrine of qualified immunity. Powers is shielded from liability if she can show that her conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L.Ed.2d 396, 410 (1982). It must be objectively discernible in light of the law as it then existed that the defendant's conduct would violate that right. *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987).

Powers contends that the *Davis* decision established a new rule of law. The court finds, however, that the doctrinal underpinnings of *Davis* are long-standing principles. Intergovernmental tax immunity has its genesis in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819). Similarly, 4 U.S.C. § 111, which plainly allows for only non-discriminatory taxation of federal employees, was enacted in 1939.

The substance of the defendant's argument is that she should not be required to forecast Supreme Court decisions at the risk of personal liability. In the court's opinion, however, *Davis* was inevitable. State officials should not be allowed to continue blatantly unconstitutional conduct until the courts specifically rule it unconstitutional. Powers had the statutory responsibility to regulate, monitor, advise, and act upon problems in administering the state tax code. *See* N.C. Gen. Stat. §§ 143B-218, 143B-219, 147-88, 105-257, and 105-453. Nevertheless, she collected unconstitutional taxes that she should have known were unconstitutional.

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474 U.S. 64, 68, 106 S. Ct. 423,426,88 L.Ed.2d 371 (1985).

Soon after the enactment of 4 U.S.C. § 111, the North Carolina Attorney General reported in a February 12, 1940, Memorandum to the Commissioner of Revenue that section 111 "gives the consent of Congress to *non-discriminatory state taxation* of the compensation of Federal employees." Plaintiffs' Memorandum, Exhibit 14. The state instituted its discriminatory tax scheme in 1941; potential problems were first noted in a 1941 *North Carolina Law Review* article: "This may be permissible with respect to such state taxes as the income tax (unless it eventually face [s] trouble because of non-exemption for other annuities)." 19 N.C.L.Rev. 435, 519 (1941). Furthermore, on or about July 29, 1988, the defendant's office received a report from the Federation of Tax Administrators which included a two-page discussion of *Davis v. Michigan*. Finally, the discrepancy between federal and state retirement pay taxation was the subject of internal discussions throughout 1988 and 1989. Plaintiffs' Memorandum, Exhibits 18 (Letter from Department of Revenue to Legislative Counsel for the Governor) and 19 (Tax Fairness Commission Report of January 11, 1989).

Powers now asserts that it was unclear until *Davis* whether retired [sic] benefits were compensation for purposes of the Public Salary Tax Act. The *Davis* Court, however, found it obvious that retirement benefits were compensation. 109 S. Ct. at 1504. Moreover, it has been long-settled in North Carolina that retirement benefits are compensation. *See e.g. Bridges v. Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942). Indeed, the defendant received withholdings on federal retirement benefits pursuant to a state statute authorizing income taxes from "wages" of federal employees. N.C. Gen. Stat. § 105-163.23. The court finds, therefore, that the defendant failed to recognize the legality of her conduct and that her conduct violated clearly established federal rights of which a reasonable person should have been aware.

CONCLUSION

Accordingly, for the reasons discussed above, it is hereby ORDERED that the defendants' motion to dismiss pursuant to the Tax Injunction Act and principles of comity is DENIED. The motion to dismiss pursuant to the eleventh amendment is GRANTED as to the claims for monetary relief against the state and DENIED as to all other claims. The motion of the defendant Powers to dismiss pursuant to the doctrine of qualified immunity is DENIED.

This the 15th day of August, 1990.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, NC
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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 89-282-CIV-5-H

NORMAN W. SWANSON, et al.,	)	
	)	
Class A Plaintiffs,	)	
	)	
CHARLES L. BERRY, et al.,	)	
	)	**ORDER**
Class B Plaintiffs,	)	[Filed: May 6, 1994]
	)	
v.	)	
	)	
JANICE H. FAULKNER, et al.,	)	
	)	
Defendants.	)	

This matter is before the court on numerous motions. The parties have fully briefed these matters, and the court heard extensive oral argument on February 15, 1994. This case is ripe for ruling.

STATEMENT OF THE CASE

Retired federal employees ("Class A Plaintiffs") and active duty military personnel and reservists ("Class B Plaintiffs") filed this action on April 14, 1989, to challenge allegedly discriminatory North Carolina taxes. In February 1990, plaintiffs filed an action for money damages in the Wake County Superior Court. In an order filed August 16, 1990, this court held that the federal cause

of action was not barred by the Tax Injunction Act, 28 U.S.C. § 1341, because the state remedy is not plain, speedy, and efficient; that comity did not prevent the court from exercising jurisdiction; and that the plaintiffs' claims for monetary relief were barred by the Eleventh Amendment. After an appeal to the United States Court of Appeals for the Fourth Circuit, which has no bearing on the motions currently before the court, plaintiffs' federal cause of action rested in a dormant state for nearly three years while the state court proceedings moved ahead.

The plaintiff's state court action was eventually decided in favor of defendants by the Supreme Court of North Carolina. Swanson v. North Carolina, 329 N.C. 576, 407 S.E.2d 791 (1991). Plaintiffs sought rehearing in the state court, arguing that Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989), required judgment in their favor. In Davis, the United States Supreme Court ("Supreme Court") held that a tax similar to that complained of by plaintiffs violated principles of intergovernmental tax immunity. On rehearing, the state court adhered to its earlier decision on the grounds that Davis did not apply retroactively. Swanson v. North Carolina, 330 N.C. 390, 410 S.E.2d 490 (1991).

The Supreme Court granted certiorari, vacated the judgment of the North Carolina court, and remanded for further consideration in light of Harper v. Virginia Dep't of Taxation, 113 S. Ct. 2510 1993. Swanson v. North Carolina, 113 S. Ct. 3025 (1993). In Harper, decided in June of 1993, the Court held that the constitutional rule of Davis is to be applied retroactively. Id. at 2518. The Court also stated that the appropriate relief was a pre-deprivation or post-deprivation remedy permitting the taxpayer to challenge the collection of the tax. Id. at 2519.

While awaiting the decision of the North Carolina Supreme Court, plaintiffs moved this court for the entry of final judgment on August 6, 1993. On September 7, 1993, defendants moved to

dismiss, or in the alternative for reconsideration of this court's August 16, 1990 order. On December 30, 1993, defendants moved to dismiss on the grounds that plaintiffs' cause of action was moot. Plaintiffs moved for partial summary judgment on February 4, 1994.

The state court filed its third opinion in Swanson v. North Carolina, 335 N.C. 674, ___ S.E.2d ___, on March 4, 1994. The state supreme court held that the plaintiffs had failed to comply with the requirements of N.C. Gen. Stat. § 105-267; that statute, North Carolina's post-deprivation remedy provision, comported with due process as required by Harper; and that this court's August 16, 1990, order was not final and, therefore, would not collaterally estop the Supreme Court of North Carolina. The state court then remanded the case for entry of summary judgment for defendants. On March 7, 1993, defendants filed a motion for summary judgment in this court on the grounds of collateral estoppel or res judicata. On March 16, 1994, plaintiffs moved to sever their "Sheehy" claims or, in the alternative, for voluntary dismissal of those claims.

DISCUSSION

Summary judgment is authorized by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Defendants move for summary judgment on the grounds that plaintiffs' claim is precluded by the decision of North Carolina Supreme Court in Swanson v. North Carolina, 335 N.C. 674, ---S.E.2d --- (1994).

Before addressing defendants' claim preclusion argument, however, it is important for the court to deal briefly with defendant's challenges to jurisdiction. It is axiomatic that a court cannot enter judgment without jurisdiction. However, this court has jurisdiction over the matter and the case is not moot, as

prospective injunctive relief is available.[1] Accordingly, defendants' motion to dismiss or for reconsideration must be denied.

I. Claim and Issue Preclusion

Defendants assert that plaintiffs have already litigated the matters before this court in the state courts and lost, and that federal law requires this court to give the state judgment preclusive effect. The full faith and credit statute, 28 U.S.C. § 1738, provides that state judicial proceedings are entitled to the same full faith and credit in all courts within the United States which they would have in the courts from which they were taken. Defendants are correct that § 1738 embodies principles of collateral estoppel and res judicata. "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." Kremer v. Chemical Constr. Corp, 456 U.S. 461, 466 (1982). A federal district court is "to apply the law of the rendering state to determine whether and to what extent the state court judgment should have preclusive effect in the federal

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[1] A federal court may only decide cases in which relief is available to plaintiffs. See, e.g., Taylor v. Rogers, 781 F.2d 1047 (4th Cir. 1986). The Eleventh Amendment permits a federal court to grant prospective relief against a state. Ex Parte Young, 209 U.S. 123 (1908). This court has the constitutional authority to strike down North Carolina's allegedly unconstitutional post-deprivation remedy, N.C. Gen. Stat. § 105-267, as violative of the due process clause.

The court is aware that a federal district court cannot declare a state tax statute unconstitutional in light of the Tax Injunction Act, 4 U.S.C. § 111. California v. Grace Brethren Church, 457 U.S. 393, 408 (1982). Striking down North Carolina's post-depreciation remedy, however, would not have the effect of suspending tax collection. It would alter the method by which taxpayers could protest illegal or unconstitutional taxation by the state, and so is permitted under the Tax Injunction Act.

action." Davenport v. North Carolina Dep't of Transp., 3 F.3d 89, 92 (4th Cir. 1993).

Res judicata, or claim preclusion, bars relitigation of the same cause of action previously litigated in another forum. Bockweg v. Anderson, 333 N.C. 486, 428 S.E.2d 157 (1993). The related doctrine of collateral estoppel, or issue preclusion, prohibits the relitigation of matters actually litigated and determined in a different cause of action. Id. The doctrines are collectively referred to by many courts, including those of North Carolina, as res judicata. McInnis v. Hall, 318 N.C. 421, 427 n.1, 349 S.E.2d 552, 556 n.1 (1986). Claim and issue preclusion are the preferred terms in both federal and North Carolina courts. Id.

Defendants rely on both doctrines in support of their motion for summary judgment. Defendants' argument is brief, consisting of only one paragraph, and does not argue their point. The court must assume that defendants' motion alleges that the cause of action decided in the state court is identical to that in this federal court; defendants dispute this fact. In order to prevail on a claim of res judicata, or claim preclusion, under North Carolina law, a party must show that the first suit proceeded to a final judgment on the merits; that the same cause of action is involved; and that the parties in the second suit are parties to, or in privity with, the parties in the first suit. McInnis, 318 N.C. at 429, 349 S.E.2d at 557.

Defendants dispute that the state and federal claims are identical. Even if defendants are correct, however, the related doctrine of issue preclusion, or collateral estoppel, mandates that this court grant summary judgment to defendants.

> Collateral estoppel applies when the following requirements are met: (1) The issues to be concluded must be the same as those involved in

> the prior action; (2) in the prior action, the issues must have been raised and actually litigated; (3) the issues must have been material and relevant to the disposition of the prior action; and (4) the determination made of those issues in the prior action must have been necessary and essential to the resulting judgment.

Beckwith v. Llewellyn, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990).

Plaintiffs sued in state court to protest the collection of a tax as unconstitutional. Plaintiffs sued in federal court to protest the same tax. In both cases, the controlling issue was whether N.C. Gen. Stat. § 105-267 was a constitutional post-deprivation remedy as required by Davis v. Michigan, either on its face or as applied. Inasmuch as the same issues are involved, the first element of North Carolina's issue preclusion test is satisfied.

In the state action, the constitutionality of the state's post-deprivation remedy was raised and litigated extensively; it was the dispositive issue in the case. Therefore, the second element of the issue preclusion test is satisfied. The case could not have been decided without consideration of the issue, and so the third element of the test, whether the issue was material and relevant, is also satisfied. The fourth element is whether the issues decided were necessary and essential to the ultimate outcome of the case. The state case could not be resolved without a decision on the constitutionality of the post-deprivation remedy, and so the fourth element of the test is satisfied as well. The doctrine of collateral estoppel, also known as issue preclusion, requires that defendants' motion for summary judgment be granted.

Plaintiffs argue, however, that the state court decision cannot "reverse this Court's earlier Order." Pls.' Resp. to Defs.' Mot. to Dismiss at 5. Plaintiffs' argument rests on their assertion

that the court's August 16, 1990, order was a ruling on the merits in plaintiffs' favor. The court finds that plaintiffs' argument must be rejected. Plaintiffs rely on Age Int'l v. Miller, 830 F. Supp. 1484 (N.D. Ga. 1993), for the conclusion that a finding that a post-deprivation remedy is not "plain, speedy and efficient" under the Tax Injunction Act is the equivalent of a finding that the remedy violates due process. In that case, the district court clearly stated that the Tax Injunction Act does not require all of "the same remedial bells and whistles that are required by the Due Process Clause." Id.

The Supreme Court recognizes that the Tax Injunction Act and the due process clause are different. A post-deprivation remedy is sufficient if it provides a taxpayer with a hearing and a judicial determination at which a taxpayer may raise constitutional objections to the tax. Rosewell v. La Salle Nat'l Bank, 450 U.S. 503 (1981). The Supreme Court did not expressly require that a tax violate due process before a district court lifted the Tax Injunction Act's procedural bar. Had the Court intended to do so, it would have. Instead, the Court required a full judicial hearing at which constitutional objections, including allegations of due process violations, could be raised and decided. Accordingly, the Tax Injunction Act is a jurisdictional statute, and it is not coterminous with the due process clause. This court's August 16, 1990 order cannot suppress the preclusive effect of the judgment of the Supreme Court of North Carolina.

This court's August 16, 1990, order was a finding for the purposes of jurisdiction under the Tax Injunction Act. It was not a determination that N.C. Gen. Stat. § 105-267 violated the due process clause. Plaintiffs litigated their due process claim in front of the state supreme court and lost. This court is required, as a matter of federal law, to give preclusive effect to a judgment of the North Carolina Supreme Court. To borrow the words of plaintiff, this court does feel somewhat like a "potted plant" in its inability to reach the merits of this case. However, the contours of

American federalism and the Tax Injunction Act compel the result the court reaches today.

II. The "Sheehy" Claims

Plaintiffs also move the court to sever, or to grant voluntary dismissal, on their "Sheehy" claims. Plaintiffs allege that when North Carolina raised its retirement benefits, so as to give to state employees the same income they enjoyed under the discriminatory tax scheme struck down in Davis, it continued to discriminate against plaintiffs. In Sheehy v. Pub. Employees Retirement Div., 864 P.2d 762 (Mont. 1993), the state supreme court of Montana found that an increase in funding to state pension benefits was, because it was part of a tax adjustment bill, a tax refund. The Montana court held that the tax refund violated the principles established in Davis by taxing in a discriminatory fashion on the basis of the source of the income.

A motion to sever is a matter committed to the discretion of the court. Arnold v. Eastern Airlines, 681 F.2d 186 (4th Cir. 1982). The court must weigh any genuine risk of prejudice or confusion against the necessity of trying the claims together. Molever v. Levenson, 539 F.2d 996 (4th Cir. 1976). Voluntary dismissal, or a plaintiff's motion for dismissal without prejudice, is also a matter of discretion. Davis v. USX Corp., 819 F.2d 1270 (4th Cir. 1987). "A plaintiff's motion . . . for dismissal without prejudice should not be denied absent substantial prejudice to the defendant." Andes v. Versant Corp., 788 F.2d 1033, 1036 (4th Cir. 1986).

In support of their motion, plaintiffs contend that, first, they require a brief period of additional discovery, and second, that plaintiffs expect defendants to immediately appeal this court's decision. Defendants assert that judicial economy requires that the claims be tried together. Defendants also emphasize the fact that discovery has been closed for some time. Defendants finally note

that because plaintiffs presented their claim to the state supreme court, the same preclusion principles that govern the body of the case also control this issue.

Plaintiffs first presented the "Sheehy" claims to this court in 1993, nearly four years after filing suit. Defendants object to severance or dismissal on the grounds that they will be prejudiced by the reopening of discovery or being forced to defend themselves in a separate action by plaintiffs. Defendants have not expended significant effort, however, in defending the Sheehy claims. Those arguments were not presented to the court until the state supreme court of Montana issued its ruling in 1993. In contrast, the prejudice to plaintiffs in prosecuting claims without adequate discovery might work a substantial hardship to them.

The court also notes that whatever the merits of plaintiffs' "Sheehy" claims might be, they are subject to the requirements of the North Carolina post-deprivation remedy, N.C. Gen. Stat. § 105-267. The constitutionality and applicability of that statute has already been decided by the North Carolina Supreme Court, and the issue preclusion bar applies to plaintiffs' "Sheehy" claims. It is not clear from the pleadings and memoranda, however, whether plaintiffs complied with the requirements of the post-deprivation remedy. Accordingly, either severance or dismissal without prejudice of the "Sheehy" claims is appropriate.

Neither voluntary dismissal nor severance would work substantial hardship on defendants. Defendants did not have to defend the "Sheehy" claims until plaintiffs raised them in 1993. Dismissal without prejudice will permit plaintiffs to assess their case and properly plead it, should they elect to refile. Because motions for voluntary dismissal are to be freely granted, the court will grant plaintiffs' motion for voluntary dismissal.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss or for reconsideration is DENIED. Plaintiffs' motion to sever is DENIED. Plaintiffs' motion to dismiss without prejudice their claim for relief based on Sheehy v. Pub. Employees Retirement Div., for the taxable years 1990 to the present, is GRANTED. Defendants' motion for summary judgment is GRANTED as to all other claims remaining before the court. Plaintiffs' motions for partial summary judgment and for the entry of final judgment are, accordingly, DENIED. Inasmuch as all matters before the court are concluded, the court ORDERS entry of final judgment in favor of defendants. The clerk is directed to close this case.

This the 4th day of May, 1994.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

I certify the foregoing to be a true and correct copy of the original. David W. Daniel, Clerk United States District Court, Eastern District of North Carolina.

/s/ Cherlyn Wells
CHERLYN WELLS
Deputy Clerk

At Greenville, NC
#16

APPENDIX I

[The Great Seal of the State of North Carolina]
North Carolina Department of Revenue
P.O. Box 25000 • Raleigh, North Carolina 27640

James G. Martin, Governor — Helen A. Powers, Secretary

July 11, 1989

HAND DELIVERY

Mr. G. Eugene Boyce
Womble Carlyle Sandridge & Rice
Post Office Box 831
Raleigh, North Carolina 27602

Re: Swanson v. Powers; 89-282-CIV-5-H

Dear Mr. Boyce:

I have your letter of April 14, 1989, captioned Notice of Refund Demand on Behalf of Federal Pensioners in North Carolina, and your letter of April 18, 1989, captioned Second Notice of Refund Demand on Behalf of Federal Pensioners in North Carolina.

Your first letter recites that your firm has been retained to represent certain named federal retirees and "all retired federal employees and spouses of deceased federal employees who have received and reported as taxable income to the Department retirement income from the federal government. . ." Your second recites that you represent the members of a class certified by the U.S. District Court for the limited purpose of making demand for refund upon the Department. Both letters "demand refund of all taxes paid to date and to be paid hereafter by the named and unnamed members of this class due to inclusion of federal retirement pay in their taxable incomes." Both letters cite four

provisions of the North Carolina Revenue Laws relating to the refund of taxes: G.S. 105-266, G.S. 105-266.1, G.S. 105-267, and G.S. 105-267.1.

Under the present circumstances, the Department of Revenue is authorized to make refunds of income taxes paid with respect to federal retirement income only upon a proper demand by an identified taxpayer pursuant to G.S. 105-267.

In order to constitute a valid demand for refund under G.S. 105-267, a taxpayer's request must include sufficient information to permit the Department to determine whether a refund may be made and, if so, in what amount. Such information would normally consist of the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of federal retirement income received by the taxpayer during the year.

To the extent that your letters furnish information concerning the named taxpayers sufficient to determine the amount of tax which they paid with respect to federal retirement income for each year in question, the Department will, pursuant to G.S. 105-267, 105-267, issue refunds of any such tax paid by those persons within the thirty days preceding the date of your letter.

To the extent that your letter makes demand for refund of taxes paid by unnamed persons or by named persons not sufficiently identified to permit a determination as to their liability, your letter will not be considered a valid demand for refund, and no refunds will be issued.

Very truly yours,

/s/ Helen A. Powers
HELEN A. POWERS
Secretary of Revenue

HAP/wp

THE GREAT SEAL OF THE STATE OF NORTH CAROLINA

North Carolina Department of Revenue
P. O. Box 25000 • Raleigh, North Carolina 27640

James G. Martin, Governor Helen A. Powers, Secretary

April 26, 1990

Wallace R. Young, Jr.
Womble Carlyle Sandridge & Rice
Post Office Box 831
Raleigh, North Carolina 27602

Re: Swanson v. Powers; 89-282-CIV-5-H
Swanson v. State; 90 CVS 2127

Dear Mr. Young:

I have your letter of April 12, 1990, captioned Notice of Refund Demand on Behalf of Federal Pensioners in North Carolina and for Members of the Federal Active Duty and Reserve Military Forces of North Carolina, and also the attached document signed by Judge Samuel T. Currin and captioned Ex Parte Order of Conditional Class Certification.

Your letter recites that your firm represents the plaintiffs in the above actions and that you "make a demand for a refund of all income taxes paid for tax years 1985 to present, and to be paid hereafter, by the named and unnamed members of the class A and B plaintiffs due to the unconstitutional and unlawful taxes imposed upon them." The demand is said to be made pursuant to Judge Currin's order and "[i]n accordance with N. C. Gen. Stat. Chap. 105. . . and any and all other applicable statutory provisions." In particular, your letter cites four provisions of the North Carolina Revenue Laws relating to the refund of taxes: G.S. 105-266, G.S. 105-266.1, G.S. 105-267, and G.S. 105-267.1.

As stated in my response to your letters of April 14 and 18, 1989, the Department of Revenue is authorized to make refunds of taxes alleged to have been paid pursuant to an unconstitutional statute only upon a proper demand by an identified taxpayer pursuant to G.S. 105-267.

In order to constitute a valid demand for refund under G.S. 105-267, a taxpayer's request must include sufficient information to permit the Department to determine whether a refund may be made and, if so, in what amount. Such information would normally consist of the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of federal retirement income received by the taxpayer during the year.

Your letter does not identify any individual taxpayer, nor does it furnish information sufficient to determine the amount of tax which any taxpayer paid with respect to federal military or retirement income for any of the taxable years in question. Accordingly, your letter will not be considered a valid demand for refund, and no refunds will be issued.

Very truly yours,

/s/ Helen A. Powers
HELEN A. POWERS
Secretary of Revenue

HAP/wp

APPENDIX J

IN THE SUPREME COURT OF NORTH CAROLINA
No. 64PA91-3 Wake County

IN THE SUPREME COURT OF NORTH CAROLINA

NORMAN W. SWANSON, et al.,

Class A Plaintiffs,

CHARLES L. BERRY, et al.,

Class B Plaintiffs,

vs.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually, BETSY Y. JUSTUS as Secretary of THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE STATE OF NORTH CAROLINA,

Defendants.

JUDGMENT

This cause came on to be argued upon remand by the United States Supreme Court for further consideration in light of Harper v. Virginia Department of Taxation, 509 U.S. _____, 125 L. Ed. 74 (1993).

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable James G. Exum, Jr., Chief Justice, be certified to the Superior Court, Wake County, to the intent that the decision of the Superior Court granting summary judgment is reversed and the case is remanded for entry of judgment for defendants dismissing the action.

And it is considered and adjudged further, that the Plaintiffs do pay the costs of the appeal in this Court incurred, to wit, the sum of Three Hundred Fifty-three and 20/100 dollars ($353.20), and execution issue therefor.

Certified to the Superior Court, Wake County, this 24th day of March, 1994.

A TRUE COPY

The Great Seal of the
State of North Carolina

CHRISTIE SPEIR CAMERON
Clerk of the Supreme Court

/s/ By: Peggy N. Buford
Assistant Clerk

APPENDIX K

Womble Carlyle Sandridge & Rice
800 Wachovia Building
Raleigh, North Carolina 27601

* * *

(919) 755-2104

April 14, 1989

The Honorable Helen A. Powers
Secretary of the
North Carolina Department of Revenue
Revenue Building
Raleigh, North Carolina 27640

NOTICE OF REFUND DEMAND ON BEHALF OF FEDERAL PENSIONERS IN NORTH CAROLINA

Dear Secretary Powers:

We have just been engaged to represent the retired federal employees and spouses of deceased retired federal employees whose names, addresses and social security numbers appear on the attachment. We execute this demand on their behalf and as their authorized agent and will supply written evidence of our authorization upon request.

At the request of said individuals, and as officers of the court in the interests of justice, we also represent all retired federal employees and spouses of deceased federal employees who have received and reported as taxable income to the Department retirement income from the federal government (including any branch, department or agency thereof) at any time during any and all periods in which refund of any taxes paid on account of such

income is available to them either under N.C.G.S. §105-266, §105-266.1, §105-267 or §105-267.1 or other legal means. In the normal case we understand that period will include tax years 1985, 1986, 1987 and 1988. Our representation of this class as a class is necessary to provide all of the members a right to a fair, speedy and efficient refund.

We hereby protest and demand refund of all taxes paid to date and to be paid hereafter by the named and unnamed members of this class due to inclusion of federal retirement pay in their taxable incomes, upon the authority of Davis v. Michigan Department of Treasury, ____ U.S. _____ 109 S. Ct. 1500 (1989), and the opinion of the N.C. Attorney General dated April 10, 1989 addressed by Mr. George W. Boylan to Michael S. Hodges.

We understand that Mr. Hodges, Director of the Individual Income Tax Division of the Department, has informed the N.C. Association of Certified Public Accountants that an acceptable form of claim for refund in this instance may be made by a letter to the Department making known the amount of federal pension included in North Carolina taxable income and requesting refund of the specific amount of North Carolina taxes paid on same.

The amounts of federal pensions received by the named taxpayers for each year are known to the N.C. Department of Revenue and in part are listed on the attachments with respect to the taxpayers authorizing this letter, or will be provided. Please forgive the absence from this demand of the exact amounts of refund claimed since such computations obviously could not be made in time for inclusions in this letter in light of our recent employment and the possible need for haste in making this request. This information is in possession of your Department or will be provided by amendment and, of course, the determination of the exact amounts of the refunds is a ministerial act once the amounts of nontaxable income are identified, which your records also reflect.

We are unable to comply with Mr. Hodges' request for the names, addresses, social security numbers and amounts of unnamed members of the class because such information is not available to us at this time. Such information is known to the Department, however, as it is specifically reflected on the returns of all federal retirees and survivors receiving pension benefits and, we understand, is readily available and retrievable by the Department's computer resources. At this time, we refer the Department to that information, but we shall provide appropriate amendments as the information is ascertained, and incorporate such public documents herein by reference.

To the extent you have in your possession these taxes for which refunds are demanded, we request that you segregate such funds for repayment to the named and unnamed class members.

Sincerely,

/s/ Eugene Boyce
G. EUGENE BOYCE

GEB:tm

I acknowledge receipt of this letter on behalf of the North Carolina Department of Revenue and its Secretary, this the 14th day of April, 1989 at 4:45 p.m.

/s/ Helen A. Powers

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * *

April 18, 1989

(919) 755-2104

The Honorable Helen A. Powers
Secretary of the
North Carolina Department of Revenue
Revenue Building
Raleigh, North Carolina 27640

SECOND NOTICE OF REFUND DEMAND ON BEHALF OF FEDERAL PENSIONERS IN NORTH CAROLINA

Dear Secretary Powers:

As you know, we have recently been engaged to represent the retired federal employees and spouses of deceased retired federal employees whose names, addresses and social security numbers appear on the attachment. We execute this demand on their behalf and as their authorized agent and will supply written evidence of our authorization upon request.

At the request of said individuals and pursuant to the April 14, 1989 Order of U.S. District Court Judge F. T. Dupree, Jr., attached hereto, we also represent all retired federal employees and spouses of deceased federal employees who have received and reported as taxable income to the Department retirement income from the federal government (including any branch, department or agency thereof) at any time during any and all periods in which refund of any taxes paid on account of such income is available to them either under N.C.G.S. §105-266, §105-266.1, §5105-267 or §105-267.1 or other legal means. In the normal case we

understand that period will include tax years 1985, 1986, 1987 and 1988. Our representation of this class as a group is necessary to provide all of the members a right to a fair, speedy and efficient refund.

We hereby protest and demand refund of all taxes paid to date and to be paid hereafter by the named and unnamed members of this class due to inclusion of federal retirement pay in their taxable incomes, upon the authority of Davis v. Michigan Department of Treasury, ___ U.S. ___ 109 S. Ct. 1500 (1989), and the opinion of the N.C. Attorney General dated April 10, 1989 addressed by Mr. George W. Boylan to Michael S. Hodges.

We understand that Mr. Hodges, Director of the Individual Income Tax Division of the Department, has informed the N.C. Association of Certified Public Accountants that an acceptable form of claim for refund An this instance may be made by a letter to the Department making known the amount of federal pens ion included in North Carolina taxable income and requesting refund of the specific amount of North Carolina taxes paid on same.

The amounts of federal pensions received by the named tax-payers for each year are known to the N.C. Department of Revenue and in part are listed on the attachments with respect to the named taxpayers authorizing this letter, or will be provided. Please forgive the absence from this demand of the exact amounts of refund claimed since such computations obviously could not be made in time for inclusions in this letter in light of our recent employment and the possible need for haste in making this request. This information is in possession of your Department or will be provided by amendment and, of course, the determination of the exact amounts of the refunds is a ministerial Oct. once the amounts of nontaxable income are identified, which your records also reflect.

We are unable to comply with Mr. Hodges' request for the names, addresses, social security numbers and amounts of

unnamed members of the class because such information is not available to us at this time. Such information is known to the Department, however, as it is specifically reflected on the returns of all federal retirees and survivors receiving pension benefits and, we understand, is readily available and retrievable by the Department's computer resources. At this time, we refer the Department to that information, but we shall provide appropriate amendments as the information is ascertained, and incorporate such public documents herein by reference.

To the extent you have An your possession these taxes for which refunds are demanded, we request that you segregate such funds for repayment to the named and unnamed class members.

Sincerely,

/s/ G. Eugene Boyce
G. EUGENE BOYCE

GEB:tm

Norman W. Swanson
829 Yorkshire Road
Winston-Salem, NC
SSN: 343-01-6760
1988 - $16,815.96

Henry F. Murray
3430 Sandon Place
Winston-Salem, NC 27104
SSN: 015-05-6273
1988 - $19,085.04

Carl L. Whitney
2301 Bermuda Village
Advance, NC 27006
SSN: 019-01-3886
1988 - $

William Z. Nicholson, III
4021 Whirlaway Court
Clemmons, NC 27102
SSN: 246-40-4190
1988 - $16,848.00

Charles A. Dancey
P.O. Box 519
Bermuda Run
Advance, NC 27006
SSN: 439-56-7885
1988 - $

Melvin F. Eyerman
1244 Arbor Road - 444
Winston-Salem, NC 27104
SSN: 278-36-3932
1988 - $32,691.24

Ira N. Schwarz
167 Poteat Road
Mt. Airy, NC 27030
SSN: 578-34-6806
1988 - $38,785.00

John L. Powell, Jr.
2001 Mallard Lake Drive
Winston-Salem, NC 27106
SSN: 244-38-0035
1988 - $29,555.00

Mrs. Galena Elworth
1652 Rockingham Drive
Winston-Salem, NC 27103
SSN: 288-07-5384
1988 - $12,261.00; Military - $5,910.00; Civil Service - $6,351.00

Donald V. Wallace
5011 Rushland Drive
Winston-Salem, NC 27104
SSN:
1988 - $

William E. Denton
1136 Tommy's Lake Road
Winston-Salem, NC 27105
SSN: 245-12-9870
1988 - $26,730.00

Robert A. Nisbet
1244 Arbor Road - 196
Winston-Salem, NC 27104
SSN: 168-10-3242
1988 - Total - $21,843.24; Military - $10,983.24; Civil Service - $10,860.00

Walter J. Bartnikowski
145 Queenbury Road
Winston-Salem, NC 27104
SSN: 060-18-4773
1988 - $9,161.00

Ralph P. Hunt
Rt. #7, Box 1780
Lexington, NC 27292
SSN: 246-38-3961
1988 - $27,684.00

Marion B. Zollicoffer
3220 Nottingham Rd.
Winston-Salem, NC 27104
SSN: 239-24-4773
1988 -

William H. Talbert
5021 Eastwind Drive
Winston-Salem, NC 27104
SSN: 245-34-5593
1988- $35,022.00

Billy Clark
650-B Rugby Row
Winston-Salem, NC 27106
SSN: 223-28-2036
1988 - $26,730.00

Wallace M. Davis
Box 520
Bermuda Run
Advance, NC 27006
SSN: 327-01-9776
1988 - $8,306.00

Grady L. Strange
3611 Welch Circle
Winston-Salem, NC 27127
SSN: 248-54-4771
1988 - $20,196.00

Hamilton M. Howe
800 Chester Road
Winston-Salem, NC 27104
SSN: 225-46-5326
1988 - $29,574.36

Mary L. Pritchard
2292 Brecknock Drive
Winston-Salem, NC
SSN: 210-16-1010
1988 - $29,388.00

Robert B. Campbell
422 N. Hawthorne Road
Winston-Salem, NC 27104
SSN: 246-01-5740
1988 - $37,032.00

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * *

March 12, 1990

(919) 755-2115

The Honorable Helen A Powers
Secretary of the North Carolina
Department of Revenue
Revenue Building
2 South Salisbury Street
Raleigh, North Carolina 27602

HAND-DELIVERY

Re: Swanson v. Powers -- NOTICE OF REFUND DEMAND ON BEHALF OF FEDERAL PENSIONERS IN NORTH CAROLINA AND FOR MEMBERS OF THE FEDERAL ACTIVE DUTY AND RESERVE MILITARY FORCES IN NORTH CAROLINA

Dear Secretary Powers:

On February 20, 1990, Judge Howard entered an Order allowing additional Plaintiff class members to join in the above-referenced suit to challenge the Defendants' taxation of their federal compensation while exempting from the same tax liability $1,500 per year of compensation benefits received by the members of the North Carolina National Guard. Specifically, this additional group of Plaintiffs includes all individuals who:

a. in the current tax year and in tax years prior hereto have been employees of the federal government as federal active duty military and

reservist personnel (or beneficiaries, survivors, etc., of such employees) and were and are entitled to receive federal compensation; and

b. have been and are required by Defendants to pay income tax to the State of North Carolina on their federal compensation benefits during such years and who will be required to so pay in the future.

Pursuant to Judge Howard's Order and the previous Order of April 14, 1989 of Judge F. T. Dupree, Jr. and pursuant to Chapter 105 of the General Statutes of North Carolina, specifically, §§ 105-266,105-266.1,105-267,105-267.1, we hereby protest and demand a refund of income taxes paid to date and to be paid hereafter by the named and unnamed members of this class due to the unconstitutional and unlawful taxes imposed upon them. In addition to our demand of refund on behalf of members of the federal active duty and reserve military forces, we also renew our demand on behalf of federal pensioners residing in North Carolina for refunds of tax monies they paid on their federal retirement benefits from 1985 through 1988. As we have stated in previous letters, the individuals who comprise these classes, and the amount of taxes they have paid on their federal compensation, are most readily identifiable by and from the records of your Department of Revenue.

We are aware of your position stated in your letter of July 11, 1989, in which you demanded that we provide "the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of federal retirement (or other) income received by the taxpayer during the year." This position elevates form over substance. Information gathered in depositions of Department of Revenue Officials indicates that a sufficient demand may be made without all of the conditions you have specified. The Court has clearly and specifically identified the groups of individuals who

comprise the Plaintiff classes. The Department of Revenue is in the best position to identify these taxpayers as they all file returns. Once their returns are identified, it is a ministerial function to ascertain the additional specific information you desire.

Very truly yours,

/s/ Wallace R. Young, Jr.
WALLACE R. YOUNG, JR.

WRY,JR/vlt

WOMBLE CARLYLE SANDRIDGE & RICE
800 Wachovia Building
Raleigh, North Carolina 27601

* * *

April 12, 1990

(919) 755-2115

The Honorable Helen A. Powers
Secretary of the North Carolina
Department of Revenue
Post Office Box 2000
Raleigh, North Carolina 27640

Re: NOTICE OF REFUND DEMAND ON BEHALF OF FEDERAL PENSIONERS IN NORTH CAROLINA AND FOR MEMBERS OF THE FEDERAL ACTIVE DUTY AND RESERVE MILITARY FORCES OF NORTH CAROLINA

Dear Secretary Powers:

As you know, we represent the plaintiffs identified in the following captioned actions in which you have been sued in your official capacity as Secretary of Revenue as well as individually: Swanson v. Powers, 89-232-CIV-5-H (Federal District Court); and Swanson v. State, 90 CVS 02127 (Wake Superior Court).

In accordance with N.C. Gen. Stat. Chap. 105, including but not limited to N.C. Gen. Stat. §§ 105-266, 105-266.1, 105-267, and 105-267.1, and any and all other applicable statutory provisions, and pursuant to the Ex Parte Order of Conditional Class Certification signed and entered by Judge Samuel T. Currin on 11 April 1990, a copy of which is enclosed herewith, and pursuant to our previous class demand letters and federal court orders of class certification, we hereby make a demand for a

refund of all income taxes paid for tax years 1985 to present, and to be paid hereafter, by the named and unnamed members of the class A and B plaintiffs due to the unconstitutional and unlawful taxes imposed upon them. The individuals who comprise the class are readily and easily identifiable by and from the records in the possession of or available to the State of North Carolina, its departments and agencies. This is to advise that a similar demand will be made each and every thirty days hereafter for those taxpayers who file and pay income tax on any pensions, benefits or monies received from the federal government.

I request that class members or potential class members, as identified in our complaint, who pay income tax on any of the pensions, benefits, or monies heretofore mentioned be identified as soon as possible.

Sincerely,

/s/ Wallace R. Young, Jr.
WALLACE R. YOUNG, JR.

WRYJr:dey:enclosure

APPENDIX L

NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640
P. O. BOX 25000

1985

RALEIGH, N.C.
BULK RATE

U.S. POSTAGE PAID
PERMIT NO. 2

THE GREAT SEAL OF THE STATE OF NORTH CAROLINA

NOTICE TO TAXPAYER

Peel off the label above and place it in the address area of the tax return (Form D-400) you file. Please check the name and social security number on the label and be sure it is correct. If the label is pre-addressed incorrectly, you should make any necessary corrections on the label. The address on the completed tax return should reflect your permanent mailing address.

INCOME TAX FORMS AND INSTRUCTIONS

TAX HIGHLIGHTS FOR 1985

The following is a brief listing of the major tax changes for 1985. Page numbers indicate where you can find a more detailed explanation of the particular law change in these instructions.

- An additional personal exemption of $1,100 is allowed for an individual who has spina bifida (page 5).
- Deduction for the marketing assessment paid on tobacco grown in North Carolina (page 7).

- An additional personal exemption of $1,100 is allowed for an individual who has a severe head injury (page 5).
- An additional personal exemption of $1,100 is allowed for an individual who has multiple sclerosis (page 5).
- Deduction for medical expense paid for a child by divorced or separated parents (page 8).
- Deduction for maintenance and care of parent(s) age 65 or over (page 9).
- Expense limits on which the child and dependent care tax credit are based are increased (page 9).

[Redacted; only relevant portions from Page 3 of the tax instructions included]

Where to File and Pay the Tax

If you owe tax, mail your return and payment to the North Carolina Department of Revenue, P. O. Box 25000, Raleigh, North Carolina 27640. If you owe less than $1.00 you do not have to pay it, but you must still file the return. You may pay your tax by check or money order, payable to the North Carolina Department of Revenue or by cash at any of the Department's offices. Do not send cash by mail. To avoid penalty, the tax must be paid on or before the due date of the return.

Amended Returns

You may amend your tax return by filing an amended income tax return, Form D-400X. Instructions for filing an amended return are provided on the form.

Your amended tax return must be filed within three years from the date your original return was due, or within six months of the date the tax was paid, whichever date is later. The statute of limitations does not allow refunds on late filed or amended tax returns received more than three years after the due date of the return. If changes are made to your Federal income tax return by the Internal Revenue Service, you must report the changes to the State within two years from the date the report is received.

Penalties and Interest

Failure to file penalty. If you do not file your tax return by the date it is due, you will have to pay a penalty of 5% of the tax for each month, or part of a month, the return is late. The minimum penalty is $5.00; the maximum penalty cannot be more than 25% of your unpaid tax. If you file your return late, you should figure the amount of the penalty and add it to the tax due.

Failure to pay penalty. If you do not pay the tax when it is due, you must pay a late payment penalty of 10% of the unpaid tax. The minimum penalty is of 10% of the unpaid tax. The minimum penalty is $5.00. If your payment is late, figure the amount of the penalty and add it to the tax due.

Other penalties. There are additional penalties for negligence, underpayment of estimated income tax and fraud. Criminal penalties also apply for fraud with intent to evade or defeat the tax and for willful failure to file a return, supply information or pay the tax.

If you have not paid at least 80% of your estimated tax (66 2/3% for farmers and commercial fishermen), figure the amount of penalty on Form D-422, Penalty for Underpayment of Estimated Income Tax. Attach the completed form to your tax return, add the amount of the penalty to the tax due, and include the full payment with your return.

Interest. Interest is due on tax not paid by April 15th, even though you may have an extension of time for filing your tax return. The law requires that the interest rate be determined on or before December 1 of each year. The current interest rate was not available prior to the time these instructions were printed. You may obtain the current interest rate from any of the Department's offices. If you pay your tax late or under an extension of time, figure the amount of interest due and include it with the tax and any applicable penalty.

NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640
P. O. BOX 25000

1986

RALEIGH, N.C.
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INCOME TAX FORMS AND INSTRUCTIONS

TAX HIGHLIGHTS FOR 1986

The following is a brief listing of two major tax changes for 1986. Page numbers indicate where you can find a more detailed explanation of the particular law change in these instructions.

- $1,100 is allowed for a dependent who is a paraplegic, etc. (page 5).
- A tax credit is allowed for an individual with a net taxable income of no more than $15,000 (page 10).

[Redacted; only relevant portions from Page 3 of the tax instructions included]

Where to File and Pay the Tax

If you owe tax, mail your return and payment to the North Carolina Department of Revenue, P. O. Box 25000, Raleigh, North Carolina 27640. If you owe less than $1.00 you do not have to pay it, but you must still file the return. You may pay your tax by check or money order, payable to the North Carolina Department of Revenue or by cash at any of the Department's offices. Do not send cash by mail. To avoid penalty, the tax must be paid on or before the due date of the return.

Amended Returns and the Statute of Limitations

You may amend your tax return by filing an amended income tax return, Form D-400X. Instructions for filing an amended return are provided on the form.

To receive a refund, you amended tax return must be filed within three years from the date the original return was due or within six months of the date the tax was paid, whichever date is later. The statute of limitations does not allow refunds on late filed or amended tax returns received more than three years after the due date of the return.

Amended returns on which you owe additional tax are required to be filed and the tax paid within three years after the date on which the original return was filed or within three years from the date required by law or filing the return, whichever is later.

If changes are made to your Federal income tax return by the Internal Revenue Service, you must report the changes to the State within two years from the date the report is received. If you do not amend your State return reflecting these Federal changes and the report is received from the Internal Revenue Service an assessment may be made by the Department of Revenue within

five years from the date of receipt of the report, and you forfeit your right to any refund which might have been due by reason of the changes.

Penalties and Interest

Failure to file penalty. If you do not file your tax return by the date it is due, you will have to pay a penalty of 5% of the tax for each month, or part of a month, the return is late. The minimum penalty is $5.00; the maximum penalty cannot be more than 25% of your unpaid tax. If you file your return late, you should figure the amount of the penalty and add it to the tax due.

Failure to pay penalty. If you do not pay the tax when it is due, you must pay a late payment penalty of 10% of the unpaid tax. The minimum penalty is of 10% of the unpaid tax. The minimum penalty is $5.00. If your payment is late, figure the amount of the penalty and add it to the tax due.

Other penalties. There are additional penalties for negligence, underpayment of estimated income tax and fraud. Criminal penalties also apply for fraud with intent to evade or defeat the tax and for willful failure to file a return, supply information or pay the tax.

The penalty for underpayment of estimated income tax should be compute[illegible] on Form D-422, Penalty for Underpayment of Estimated Tax by Individuals. The penalty will not apply if each of your payments equal 25% of the lesser of 80% (66 2/3% for farmers and fishermen) of the tax due on your current year's return or 100% of the tax due on your previous year's return. If the penalty is applicable, attach the completed form to your tax return, add the amount of the penalty to the tax due, and include the full payment with your return.

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NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640

1987

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If you need additional forms and schedules not included in this package, please complete the order blank on page 12 of these instructions and mail it to us or call us from anywhere in North Carolina toll-free at 1-800-451-1404. This number is for forms requests only and is available from January 2 through April 15. If you have questions about filing your income tax return or if you wish to inquire about your refund, please call us at (919) 733-4682 (this is not a toll-free number). For additional forms or assistance, you may contact any branch office listed below.

[Redacted; only relevant portions from Page 3 of the tax instructions included]

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If you owe tax, mail your return and payment to the North Carolina Department of Revenue, P. O. Box 25000, Raleigh, North Carolina 27640. If you owe less than $1.00 you do not have to pay it, but you must still file the return. You may pay

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Penalties and Interest

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offices. If you pay your tax late or under an extension of time, figure the amount of interest due and include it with the tax and any applicable penalty.

NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640

1988

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If you need additional forms and schedules not included in this package, please complete the order blank on page 12 of these instructions and mail it to us or call us from anywhere in North Carolina toll-free at 1-800-451-1404. This number is for forms requests only and is available from 8:00 a.m. to 5:00 p.m., Monday through Friday, from January 3 through April 17. You should file your income tax return as soon as possible after January 1 but not later than April 17, 1989. If you file your return late, you may be subject to penalties and interest. See Penalties and Interest on page 3. If you are due a refund, the earlier you file your return the sooner you will receive your refund check.

[Redacted; only relevant portions from Page 3 of the tax instructions included]

Where to File and Pay the Tax

If you owe tax, mail your return and payment to the North Carolina Department of Revenue, P. O. Box 25000, Raleigh, North Carolina 27640. If you owe less than $1.00 you do not have to pay it, but you must still file the return. You may pay your tax by check or money order, payable to the North Carolina Department of Revenue or by cash at any of the Department's

offices. Do not send cash by mail. To avoid penalty, the tax must be paid on or before the due date of the return.

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To receive a refund, you amended tax return must be filed within three years from the date the original return was due or within six months of the date the tax was paid, whichever date is later. The statute of limitations does not allow refunds on late filed or amended tax returns received more than three years after the due date of the return.

Amended returns on which you owe additional tax are required to be filed and the tax paid within three years after the date on which the original return was filed or within three years from the date required by law or filing the return, whichever is later.

If changes are made to your Federal income tax return by the Internal Revenue Service, you must report the changes to the State within two years from the date the report is received. If you do not amend your State return reflecting these Federal changes and the report is received from the Internal Revenue Service an assessment may be made by the Department of Revenue within five years from the date of receipt of the report, and you forfeit your right to any refund which might have been due by reason of the changes.

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Other penalties. There are additional penalties for negligence, underpayment of estimated income tax and fraud. Criminal penalties also apply for fraud with intent to evade or defeat the tax and for willful failure to file a return, supply information or pay the tax.

The penalty for underpayment of estimated income tax should be computed on Form D-422, Penalty for Underpayment of Estimated Tax by Individuals. The penalty will not apply if each of your payments equal 25% of the lesser of 80% (66 2/3% for farmers and fishermen) of the tax due on your current year's return or 100% of the tax due on your previous year's return. If the penalty is applicable, attach the completed form to your tax return, add the amount of the penalty to the tax due, and include the full payment with your return.

Interest. Interest is due on tax not paid by April 15th, even though you may have an extension of time for filing your tax return. The law requires that the interest rate be determined on or before December 1 of each year. The current interest rate was not available prior to the time these instructions were printed. You may obtain the current interest rate from any of the Department's offices. If you pay your tax late or under an extension of time, figure the amount of interest due and include it with the tax and any applicable penalty.

APPENDIX M

STATE OF NORTH CAROLINA

INDIVIDUAL INCOME TAX BULLETINS

[THE GREAT SEAL OF THE STATE OF NORTH CAROLINA]

TAXABLE YEARS 1985 AND 1986

ISSUED BY
NORTH CAROLINA DEPARTMENT OF REVENUE
P. O. BOX 25000, RALEIGH, NORTH CAROLINA, 27640

PREFACE

This publication was prepared for the purpose of presenting the administrative interpretation and application of North Carolina income tax laws relating to individuals, partnerships, estates, and trusts in effect at the time of publication for income years beginning on and after January 1, 1985. It does not cover all phases of the law.

Taxpayers are cautioned that this publication is intended merely as a guide and that consideration must be given to all the facts and circumstances in applying these bulletins to particular situations. Taxpayers using this publication should be constantly aware that additional changes may result from legislative action, court decisions, and rules adopted or amended under the Administrative Procedure Act, Chapter 150A of the General Statutes. In no case should these Bulletins be relied upon for years other than the taxable years 1985 and 1986.

SUBJECT: STATUTE OF LIMITATIONS AND FEDERAL CHANGES

1. *General:* The statute provides certain time limitations, generally referred to as the "statute of limitations."

There are also specific requirements for the reporting of federal income tax changes.

2. *Limitations for assessments:*

(a) An assessment for tax or additional tax due may be made within three years after the date a return is actually filed or within three years from the date required by law for filing the return, whichever is later.

Even though a joint return is not acceptable for State income tax purposes, when a husband and wife do file jointly, the joint return is considered to be a return filed by either or both for the purpose of determining when the statute of limitations will run.

A tentative return from which material particulars are missing is not a return for the purpose of determining when the statute of limitations will run. The date the final return is filed is the determining date.

There is no statutory provision prohibiting the making of an assessment for a given year after an assessment has already been made for that year. When new facts are revealed which are of sufficient importance to justify a second assessment, it will be made. A second assessment will be made in every case where notification of a federal change reveals an adjustment of a sufficient amount to justify an assessment.

(b) If a return for any income year beginning on or after January 1, 1969, has not been filed by a taxpayer, any tax or additional tax due from the taxpayer for such year may be assessed at any time.

(c) When fraud is involved, there is no statute of limitations for an assessment for tax or additional tax. This is the case regardless of whether or not a return has been filed by the individual.

(d) The statute of limitations is extended for making assessments taxing an individual on a gain from the sale of a principal residence until three years after the taxpayer notifies the Department of Revenue of the amount reinvested within the required time, his intention not to reinvest, or his failure to reinvest within the required time, his intention not to reinvest, or his failure to reinvest within the required time.

3. *Federal Changes:*

(a) If the amount of net income reported or reportable by any taxpayer for any year is changed, corrected, or otherwise determined by the U.S. Government, the taxpayer must make a return to the State showing that change or determination of net income within two years after receipt of the Internal Revenue Agent's Report.

(b) If an individual makes a return reflecting the corrected or determined net income, an assessment may be made within three years from the date this return is actually filed. If the individual does not make the return to the State reflecting the federal changes or determination of net income within two years after receipt of the Internal Revenue Agent's Report, and a report is received from the U.S. Government reflecting the corrected net income, an assessment may be made within five years from the date of receipt by the Department of Revenue of the report from the U.S. Government, and the individual forfeits his right to any refund which might be due by reason of the changes.

Even though an individual is allowed a two-year period following receipt by him of the Internal Revenue Agent's Report to report the federal changes, an assessment can be made by the Department

immediately following the receipt from any source of information concerning the correction, change in, or determination of the net income of the taxpayer by the U.S. Government.

If no return reflecting the changes made is received from the individual and no report is received from the United States Government, no statute of limitations applies, and an assessment for income tax may be made at any time based on the information acquired.

(c) When an Internal Revenue Agent's Report is received reflecting changes made in the net taxable income of an individual, the Department may assess tax or additional tax based on applicable federal changes and may also make any other changes based on any facts or evidence discovered from any other source. This is the case regardless of whether or not a previous assessment has been made for the same taxable year.

4. *Federal changes and fraud:* When there is a federal change and a fraud penalty is assessed by the federal government, the State may open the year on the basis of either fraud or the federal assessment; and if a State return has not been filed, the 50% fraud penalty and the 5% per month ($5.00 minimum; 25% maximum) delinquency penalty may be assessed.

5. *Failure to pay tax:* If an income tax liability has been established within the proper time, there is no statute of limitations for the collection of tax due unless a certificate of tax liability is docketed. The tax represented by a certificate of tax liability abates 10 years from the date it was docketed unless the time is extended by the specific provisions of G.S. 105-242(c).

6. *Refunds:* G.S. 105-266 authorizes refunds to taxpayers for overpayment of taxes of $3.00 or more with interest beginning 90 days after the tax was paid. A refund of less than $3.00 will not be made unless a written request is received from the taxpayer. The section also provides a time limit for refunds by specifying

that ". . .no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three (3) years from the date set by the statute for the filing of the return or within six (6) months of the payment of the tax alleged to be an overpayment whichever date is the later." If the taxpayer has been granted an extension of time for filing the return, the three year period referred to in G.S. 105-266 is three years from the extended date.

G.S. 105-163.16 provides for the refunding of overpayments amounting to $1.00 or more which results from the withholding of income taxes from wages at the source or from payments made on estimated tax. An overpayment of less than $1.00 will not be refunded except upon receipt of a written demand from the taxpayer. Interest on these overpayments will be comp ited from a date six months from the time the return is filed or is due to be filed, whichever is later.

The time limit for claiming refunds is three years from the due date or six months after payment whichever is later, except in the case of federal changes as explained in 3 and under the provision of G.S. 105-267.1 explained on the following page.

The law requires the interest rate to be determined on or before December 1 of each year. The current rate of interest may be obtained by contacting the Department of Revenue.

For refunds barred by the three-year statute of limitations, G.S. 105-267.1 provides for the refunding of taxes which through clerical error, or misinterpretation of the law, or otherwise have been paid in excess of the amount legally due; provided, the demand for such refund is made within two years from the time of the payment. This two-year statute of limitations does not apply in cases where the tax is due and payable to another state. Any refund made under this statute must be certified by the Director of

the Individual Income Tax Division, approved by the Attorney General, and will not include any interest.

7. *Soldiers' and Sailors' Civil Relief Act:* Certain sections of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, are pertinent to the question of deferring collection of taxes due from persons serving in the Armed Forces.

Section 513 of the Soldiers' and Sailors' Civil Relief Act provides for deferment of payment of income taxes by military personnel for the period of military service plus six months thereafter. This applies to income taxes accrued prior to and during the period of military service; however, payment of income taxes is deferred only if the individual's ability to pay the tax is materially impaired by reason of military service.

8. *Waiver of Time Limitation:* A taxpayer may make a written waiver of the limitations of time specified by law for assessing any tax or additional tax, for either a definite or indefinite period of time, and if such waiver is accepted, the Secretary of Revenue may make an assessment at any time within the extended period. Such a waiver does not extend the limitation of time for refund. (G.S. 105-241.1; 105-266; 105-266.1)

A-132

STATE OF NORTH CAROLINA

INDIVIDUAL INCOME TAX BULLETINS

[THE GREAT SEAL OF THE STATE OF NORTH CAROLINA]

TAXABLE YEARS 1987 AND 1988

ISSUED BY
NORTH CAROLINA DEPARTMENT OF REVENUE
P. O. BOX 25000, RALEIGH, NORTH CAROLINA, 27640

PREFACE

This publication was prepared for the purpose of presenting the administrative interpretation and application of North Carolina income tax laws relating to individuals, partnerships, estates, and trusts in effect at the time of publication for income years beginning on and after January 1, 1987. It does not cover all phases of the law.

Taxpayers are cautioned that this publication is intended merely as a guide and that consideration must be given to all the facts and circumstances in applying these bulletins to particular situations. Taxpayers using this publication should be constantly aware that additional changes may result from legislative action, court decisions, and rules adopted or amended under the Administrative Procedure Act, Chapter 150A of the General Statutes. In no case should these Bulletins be relied upon for years other than the taxable years 1987 and 1988.

SUBJECT: STATUTE OF LIMITATIONS AND FEDERAL CHANGES

1. *General:* The statute provides certain time limitations, generally referred to as the "statute of limitations."

There are also specific requirements for the reporting of federal income tax changes.

2. *Limitations for assessments:*

(a) An assessment for tax or additional tax due may be made within three years after the date a return is actually filed or within three years from the date required by law for filing the return, whichever is later.

Even though a joint return is not acceptable for State income tax purposes, when a husband and wife do file jointly, the joint return is considered to be a return filed by either or both for the purpose of determining when the statute of limitations will run.

A tentative return from which material particulars are missing is not a return for the purpose of determining when the statute of limitations will run. The date the final return is filed is the determining date.

There is no statutory provision prohibiting the making of an assessment for a given year after an assessment has already been made for that year. When new facts are revealed which are of sufficient importance to justify a second assessment, it will be made. A second assessment will be made in every case where notification of a federal change reveals an adjustment of a sufficient amount to justify an assessment.

(b) If a return for any income year beginning on or after January 1, 1969, has not been filed by a taxpayer, any tax or additional tax due from the taxpayer for such year may be assessed at any time.

(c) When fraud is involved, there is no statute of limitations for an assessment for tax or additional tax. This is the case regardless of whether or not a return has been filed by the individual.

(d) The statute of limitations is extended for making assessments taxing an individual on a gain from the sale of a principal residence until three years after the taxpayer notifies the Department of Revenue of the amount reinvested within the required time, his intention not to reinvest, or his failure to reinvest within the required time, his intention not to reinvest, or his failure to reinvest within the required time.

3. *Federal Changes:*

(a) If the amount of net income reported or reportable by any taxpayer for any year is changed, corrected, or otherwise determined by the U.S. Government, the taxpayer must make a return to the State showing that change or determination of net income within two years after receipt of the Internal Revenue Agent's Report.

(b) If an individual makes a return reflecting the corrected or determined net income, an assessment may be made within three years from the date this return is actually filed. If the individual does not make the return to the State reflecting the federal changes or determination of net income within two years after receipt of the Internal Revenue Agent's Report, and a report is received from the U.S. Government reflecting the corrected net income, an assessment may be made within five years from the date of receipt by the Department of Revenue of the report from the U.S. Government, and the individual forfeits his right to any refund which might be due by reason of the changes.

Even though an individual is allowed a two-year period following receipt by him of the Internal Revenue Agent's Report to report the federal changes, an assessment can be made by the Department

immediately following the receipt from any source of information concerning the correction, change in, or determination of the net income of the taxpayer by the U.S. Government.

If no return reflecting the changes made is received from the individual and no report is received from the United States Government, no statute of limitations applies, and an assessment for income tax may be made at any time based on the information acquired.

(c) When an Internal Revenue Agent's Report is received reflecting changes made in the net taxable income of an individual, the Department may assess tax or additional tax based on applicable federal changes and may also make any other changes based on any facts or evidence discovered from any other source. This is the case regardless of whether or not a previous assessment has been made for the same taxable year.

4. *Federal changes and fraud:* When there is a federal change and a fraud penalty is assessed by the federal government, the State may open the year on the basis of either fraud or the federal assessment; and if a State return has not been filed, the 50% fraud penalty and the 5% per month ($5.00 minimum; 25% maximum) delinquency penalty may be assessed.

5. *Failure to pay tax:* If an income tax liability has been established within the proper time, there is no statute of limitations for the collection of tax due unless a certificate of tax liability is docketed. The tax represented by a certificate of tax liability abates 10 years from the date it was docketed unless the time is extended by the specific provisions of G.S. 105-242(c).

6. *Refunds:* G.S. 105-266 authorizes refunds to taxpayers for overpayment of taxes of $3.00 or more with interest beginning 90 days after the tax was paid. A refund of less than $3.00 will not be made unless a written request is received from the taxpayer. The section also provides a time limit for refunds by specifying

that ". . .no overpayment shall be refunded irrespective of whether upon discovery or receipt of written demand if such discovery is not made or such demand is not received within three (3) years from the date set by the statute for the filing of the return or within six (6) months of the payment of the tax alleged to be an overpayment whichever date is the later." If the taxpayer has been granted an extension of time for filing the return, the three year period referred to in G.S. 105-266 is three years from the extended date.

G.S. 105-163.16 provides for the refunding of overpayments amounting to $1.00 or more which results from the withholding of income taxes from wages at the source or from payments made on estimated tax. An overpayment of less than $1.00 will not be refunded except upon receipt of a written demand from the taxpayer. Interest on these overpayments will be computed from a date six months from the time the return is filed or is due to be filed, whichever is later.

The time limit for claiming refunds is three years from the due date or six months after payment whichever is later, except in the case of federal changes as explained in 3 and under the provision of G.S. 105-267.1 explained on the following page.

The law requires the interest rate to be determined on or before December 1 of each year. The current rate of interest may be obtained by contacting the Department of Revenue.

For refunds barred by the three-year statute of limitations, G.S. 105-267.1 provides for the refunding of taxes which through clerical error, or misinterpretation of the law, or otherwise have been paid in excess of the amount legally due; provided, the demand for such refund is made within two years from the time of the payment. This two-year statute of limitations does not apply in cases where the tax is due and payable to another state. Any refund made under this statute must be certified by the Director of

the Individual Income Tax Division, approved by the Attorney General, and will not include any interest.

7. *Soldiers' and Sailors' Civil Relief Act:* Certain sections of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, are pertinent to the question of deferring collection of taxes due from persons serving in the Armed Forces.

Section 513 of the Soldiers' and Sailors' Civil Relief Act provides for deferment of payment of income taxes by military personnel for the period of military service plus six months thereafter. This applies to income taxes accrued prior to and during the period of military service; however, payment of income taxes is deferred only if the individual's ability to pay the tax is materially impaired by reason of military service.

8. *Waiver of Time Limitation:* A taxpayer may make a written waiver of the limitations of time specified by law for assessing any tax or additional tax, for either a definite or indefinite period of time, and if such waiver is accepted, the Secretary of Revenue may make an assessment at any time within the extended period. Such a waiver does not extend the limitation of time for refund. (G.S. 105-241.1; 105-266; 105-266.1)

APPENDIX N

NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640

1990

RALEIGH, N.C.
BULK RATE

U.S. POSTAGE PAID

PERMIT NO. 2

THE GREAT SEAL OF THE STATE OF NORTH CAROLINA

Peel off the label above and place it in the address area of the tax return (Form D-400) you file. Please check the name and social security number on the label and be sure it is correct. If the label is incorrect you should make any necessary corrections on the label. The address on the completed tax return should be your permanent mailing address.

INCOME TAX HIGHLIGHTS FOR 1990

The following is a brief listing of the major tax changes for 1990. The page numbers indicate where in these instructions you can find a more detailed explanation of the change.

Tax credit for tax paid on certain government retirement benefits (Page 13)

Tax credit for a disabled dependent or a disabled spouse (Page 12)

Deduction for federal mortgage interest tax credit (Page 8)

Tax required to be paid with extension (Page 4)

S Corporation net economic loss carryforward (Page 9)

$1,500 National Guard pay exclusion repealed

INTANGIBLE PERSONAL PROPERTY TAX

Residents owning shares of stock, bonds, notes and/or other intangible personal property are required to file an intangibles tax return on or before April 15, provided the taxable value exceeds $6,000. For information concerning intangibles tax, contact the Intangibles Tax Section, N.C. Department of Revenue, P. O. Box 25000, Raleigh, N.C. 27640 or the nearest office of the Department of Revenue. You may also call the Intangibles Tax Section at (919) 733-4147 (not toll-free) for additional information.

USE TAX ON OUT-OF-STATE PURCHASES

If you purchased taxable merchandise out of state for use in North Carolina, you may be liable for a use tax on the amount of the purchase. A use tax is similar to a sales tax, and additional information about the tax and how it may be paid is explained on page 22 of these instructions.

[Redacted; only relevant portions from Page 3 of the tax instructions included]

Amended Returns and the Statute of Limitations

You may amend your tax return by filing an amended income tax return, Form D-400X. Instructions for filing an amended return are provided on the form.

To receive a refund, your amended tax return must be filed within three years from the date the original return was due, or within six months of the date the tax was paid, whichever date is later. The statute of limitations does not allow refunds on late filed or amended tax returns received more than three years after the due date of the return.

Amended returns on which you owe additional tax are required to be filed and the tax paid within three years after the date on which the original return was filed or within three years from the date required by law for filing the return, whichever is later.

If changes are made to your Federal income tax return by the Internal Revenue Service, you must report the changes to the State by filing an amended tax return within two years from the date the report is received. If you do not amend your State return to reflect the Federal changes and the report is received from the Internal Revenue Service, an assessment may be made by the Department of Revenue within five years from the date of receipt of the report, and you forfeit your right to any refund which might have been due by reason of the changes.

Penalties and Interest

Failure to file penalty. If you do not file your tax return by the date it is due, you will have to pay a penalty of 5% of the tax for each month, or part of a month, the return is late. The minimum penalty is $5.00; the maximum penalty cannot be more than 25% of the unpaid tax. If you file your return late, you should figure the amount of the penalty and add it to the tax due.

Failure to pay penalty. If you do not pay the tax by April 15, you must pay a late payment penalty of 10 percent of the unpaid tax even though you may have an extension of time for filing your tax return. The minimum penalty is $5.00. If your payment is late, figure the amount of the penalty and add it to the tax due.

NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640-0001

1991

RALEIGH, N.C.
BULK RATE

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THE GREAT SEAL OF THE STATE OF NORTH CAROLINA

NOTICE TO TAXPAYER: This is your preaddressed label. Peel off and place it in the address area of the return (Form D-400 or Form D-400EZ) you file. Please make any necessary changes directly on the label.

THIS BOOKLET CONTAINS: FORM D-400EZ, FORM D-400 FORM D-400TC, TAX TABLE, AND INSTRUCTIONS

Form D-400EZ is new for 1991. The instructions for filing Form D-400EZ are on page 2 of the form. If you qualify, you may wish to use Form D-400EZ because it is simpler and can be prepared more easily than Form D-400.

A new tax rate of 7.75 percent is in effect for taxpayers with taxable income exceeding certain amounts. See the TAX RATE SCHEDULE on page 19 to determine if the new rate applies to you.

IMPORTANT: Remember, you must complete your federal income tax return before you complete Form D-400 or Form D-400EZ. If you were a full-year resident of North Carolina or if you moved into North Carolina during 1991, you do not have to include a copy of your federal income tax return with your North Carolina return. However, if you were a nonresident of North Carolina or if you moved from North Carolina during 1991, you must include a copy of your federal return with your North Carolina return.

INCOME TAX INFORMATION AND ASSISTANCE

FORMS 1-800-451-1404 (Toll-free from 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays, from January 2 through April 15 only).

QUESTIONS/
REFUND INQUIRIES 1-800-222-9965 (733-4682 in Wake County) Toll-free from 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays

INTERNAL REVENUE SERVICE 1-800-829-1040 (Toll-free for North Carolina residents)

MAILING ADDRESSES

If you are due a Refund: → N.C. Department of Revenue
P. O. Box R
Raleigh, N.C. 27634-0001

If you owe Tax: → N.C. Department of Revenue
P. O. Box 25000
Raleigh, N.C. 27640-0640

INTANGIBLE PERSONAL PROPERTY TAX

Residents owning shares of stock, bonds, notes and/or other intangible personal property are required to file an intangibles tax return on or before April 15, provided the taxable value exceeds $6,000. For information concerning intangibles tax, contact the Intangibles Tax Section, N.C. Department of Revenue, P. O. Box 25000, Raleigh, N.C. 27640-0800 or the nearest office of the Department of Revenue. You may also call the Intangibles Tax Section at (919) 733-4147 (not toll-free) for additional information.

USE TAX ON OUT-OF-STATE PURCHASES

If you purchased taxable merchandise out of state for use in North Carolina, you may be liable for a use tax on the amount of the purchase. A use tax is similar to a sales tax, and additional information about the tax and how it may be paid is explained on page 19 of these Instructions. The USE TAX REPORT, Form E-554, is on page 20.

[Redacted; only relevant portions from Page 3 of the tax instructions included]

Amended Returns and the Statute of Limitations

You may amend your tax return by filing an amended income tax return, Form D-400X. Instructions for filing an amended return are provided on the form.

To receive a refund, your amended tax return must be filed within three years from the date the original return was due, or within six months of the date the tax was paid, whichever date is later. The statute of limitations does not allow refunds on late filed or amended tax returns received more than three years after the due date of the return.

Amended returns on which you owe additional tax are required to be filed and the tax paid within three years after the date on which the original return was filed or within three years from the date required by law for filing the return, whichever is later.

If changes are made to your Federal income tax return by the Internal Revenue Service, you must report the changes to the State by filing an amended tax return within two years from the date the report is received. If you do not amend your State return to reflect the Federal changes and the report is received from the Internal Revenue Service, an assessment may be made by the

Department of Revenue within five years from the date of receipt of the report, and you forfeit your right to any refund which might have been due by reason of the changes.

Penalties and Interest

Failure to file penalty. If you do not file your tax return by the date it is due, you will have to pay a penalty of 5% of the tax for each month, or part of a month, the return is late. The minimum penalty is $5.00; the maximum penalty cannot be more than 25% of the unpaid tax. If you file your return late, you should figure the amount of the penalty and add it to the tax due.

Failure to pay penalty. If you do not pay the full amount of the tax due by April 15 and you do not have an extension of time for filing your return, you must pay a late-payment penalty of 10 percent of the unpaid tax. If you have an extension of time for filing your return, the 10 percent penalty will apply on the remaining balance due if the tax paid by the due date of the return is less than 90 percent of the total amount of tax due. If the 90 percent rule is met, any remaining balance due, including interest, must be paid with the income tax return before the expiration of any extension period to avoid the late-payment penalty. The minimum penalty is $5,000. If your payment is late, figure the amount of the penalty and add it to the tax due.

NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640-0001

1992

RALEIGH, N.C.
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THE GREAT SEAL OF THE STATE OF NORTH CAROLINA

NOTICE TO TAXPAYER: This is your preaddressed label. Peel off and place it in the address area of the return (Form D-400 or Form D-400EZ) you file. Please make any necessary changes directly on the label.

THIS BOOKLET CONTAINS: FORM D-400EZ, FORM D-400 FORM D-400TC, TAX TABLE, AND INSTRUCTIONS

The instructions for filing Form D-400EZ are on page 2 of the form. If you qualify, you may wish to use Form D-400EZ because it is simpler and can be prepareed more easily than Form D-400.

IMPORTANT: You must complete your federal income tax return before you complete Form D-400 or Form D-400EZ. If you were a full-year resident of North Carolina or if you moved into North Carolina during 1992, you do not have to include a copy of your federal income tax return with your North Carolina return. However, if you were a nonresident of North Carolina or if you moved from North Carolina during 1992, you must include a copy of your federal return with your North Carolina return.

GET YOUR REFUND FAST BY FILING YOUR RETURN ELECTRONICALLY

Last year more than 600,000 people in North Carolina filed federal income tax returns electronically with the Internal Revenue Service. This year the North Carolina Department of Revenue has joined with the Internal Revenue Service to offer electronic filing of both federal and State income tax returns. If you are expecting a State refund for 1992 and you file your North Carolina income tax return electronically with your federal income tax return, you should receive your State refund within 2 weeks form the time the Department of Revenue accepts yoor State income tax return.

For a fee, many professional tax preparers offer federal and State electronic filing in addition to their preparation services. Even if you prepare your own income tax returns, a preparer or transmitter in your area can file your federal and State income tax electronically for you.

INCOME TAX INFORMATION AND ASSISTANCE

FORMS 1-800-451-1404 (715-0397 in Wake County) Toll-free from 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays.

QUESTIONS/
REFUND INQUIRIES 1-800-222-9965 (733-4682 in Wake County) Toll-free from 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays

INTERNAL REVENUE SERVICE 1-800-829-1040 (Toll-free within North Carolina)

PROBLEM RESOLUTION
1-800-426-2829
(715-0396 in Wake County)

The Problem Resolution telephone number is for taxpayers who have been unable to resolve their tax problems with the Department of Revenue. If you have a tax problem you cannot resolve through normal channels, call us toll-free at 1-800-426-2829 (8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays).

TAX FRAUD HOTLINE
1-800-232-4939
(733-6354 in Wake County)

The Department of Revenue provides a toll-free telephone number for citizens who wish to report instances of tax fraud. The number is 1-800-232-4939 (8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays). Caller identification is not required.

MAILING ADDRESSES

If you are due a Refund: →	N.C. Department of Revenue P. O. Box R Raleigh, N.C. 27634-0001	**If you owe Tax:** →	N.C. Department of Revenue P. O. Box 25000 Raleigh, N.C. 27640-0640

[Redacted; only relevant portions from Page 3 of the tax instructions included]

Amended Returns and the Statute of Limitations

You may amend your tax return by filing an amended income tax return, Form D-400X. Instructions for filing an amended return are provided on the form.

To receive a refund, your amended tax return must be filed within three years from the date the original return was due, or within six months of the date the tax was paid, whichever date is later. The statute of limitations does not allow refunds on late filed or amended tax returns received more than three years after the due date of the return.

Amended returns on which you owe additional tax are required to be filed and the tax paid within three years after the date on which the original return was filed or within three years from the date required by law for filing the return, whichever is later.

If changes are made to your federal income tax return by the Internal Revenue Service, you must report the changes to the State by filing an amended tax return within two years from the date the report is received. If you do not amend your State return to reflect the federal changes and the report is received from the Internal Revenue Service, an assessment may be made by the Department of Revenue within five years from the date of receipt of the report, and you forfeit your right to any refund which might have been due by reason of the changes.

Penalties and Interest

Failure to file penalty. If you do not file your tax return by the date it is due, you will have to pay a penalty of 5 percent of the tax for each month, or part of a month, the return is late. The minimum penalty is $5.00; the maximum penalty cannot be more than 25 percent of the unpaid tax. If you file your return late, you should figure the amount of the penalty and add it to the tax due.

Failure to pay penalty. If you do not pay the full amount of the tax due by April 15 and you do not have an extension of time for filing your return, you must pay a late payment penalty of 10 percent of the unpaid tax. If you have an extension of time for filing your return, the 10 percent penalty will apply on the remaining balance due if the tax paid by the due date of the return is less than 90 percent of the total amount of tax due. If the 90 percent rule is met, any remaining balance due, including interest, must be paid with the income tax return before the expiration of any extension period to avoid the late-payment penalty. The minimum penalty is $5.00. If your payment is late, figure the amount of the penalty and add it to the tax due.

A-150

NORTH CAROLINA

DEPARTMENT OF REVENUE
RALEIGH, N.C. 27640-0001

1993

RALEIGH, N.C.
BULK RATE

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PERMIT NO. 2

THE GREAT SEAL OF THE STATE OF NORTH CAROLINA

NOTICE TO TAXPAYER: This is your preaddressed label. Peel off and place it in the address area of the return (Form D-400 or Form D-400EZ) you file. Please make any necessary changes directly on the label.

THIS BOOKLET CONTAINS: FORM D-400EZ, FORM D-400, FORM D-400TC, TAX TABLE, AND INSTRUCTIONS

The instructions for filing Form D-400EZ are on page 2 of the form. If you qualify, you may wish to use Form D-400EZ because it is simpler to prepare than Form D-400.

IMPORTANT: You must complete your federal income tax return before you complete Form D-400 or Form D-400EZ. If you were a full-year resident of North Carolina or if you moved into North Carolina during 1993, you do not have to include a copy of your federal income tax return with your North Carolina return. However, if you were a nonresident of North Carolina or if you moved from North Carolina during the year, you must include a copy of your federal return with your North Carolina return.

GET YOUR REFUND FAST BY FILING YOUR RETURN ELECTRONICALLY

Last year more than 268,000 taxpayers filed their North Carolina income tax returns electronically and received their refunds within 2 weeks. If you are expecting a State income tax refund for 1993 and you file your federal and State income tax returns electronically, you should receive your State refund within 2 weeks from the date the Department of Revenue receives your State return. You must file both federal and State income tax returns electronically to participate in the program.

For a fee, many professional tax preparers offer federal and State electronic filing in addition to their regular tax return preparation services. Even if you prepare your own income tax returns, an electronic return originator in your area can file your federal and State income returns electronically.

INCOME TAX INFORMATION AND ASSISTANCE

FORMS 1-800-451-1404 (715-0397 in Wake County) Toll-free from 8:00 a.m. to 5:00 p.m., Monday through Friday, except holidays

QUESTIONS/
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INTANGIBLE PERSONAL PROPERTY TAX

Residents owning shares of stock, bonds, notes and/or other intangible personal property are required to file an intangibles tax return on or before April 15, provided the taxable value exceeds $6,000. For information concerning intangibles tax, contact the N.C. Department of Revenue, P. O. Box 25000, Raleigh, N.C. 27640-0800 or the nearest office of the Department of Revenue. You may also call us at (919) 733-4147 (not toll-free) for additional information.

USE TAX ON OUT-OF-STATE PURCHASES

If you purchased taxable merchandise out of state for use in North Carolina, you may be liable for a use tax on the amount of the purchase. A use tax is similar to a sales tax. Additional information about the tax and how it may be paid is explained on page 19. Information can also be obtained by calling Taxpayer Assistance in Raleigh at (919) 733-3661 (not toll-free). The USE TAX REPORT, Form E-554, is on page 20.

MAILING ADDRESSES

If you are due a Refund: →	N.C. Department of Revenue P. O. Box R Raleigh, N.C. 27634-0001	**If you owe Tax:** →	N.C. Department of Revenue P. O. Box 25000 Raleigh, N.C. 27640-0640

[Redacted; only relevant portions from Page 3 of the tax instructions included]

Amended Returns

You may amend your tax return by filing an amended income tax return, Form D-400X. Instructions for filing an amended return are provided on the form.

To receive a refund, your amended tax return must be filed within three years from the date the original return was due, or within six months of the date the tax was paid, whichever date is later. The statute of limitations does not allow refunds on late

filed or amended tax returns received more than three years after the due date of the return.

Amended returns on which you owe additional tax are required to be filed and the tax paid within three years after the date on which the original return was filed or within three years from the date required by law for filing the return, whichever is later.

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Penalties and Interest

Failure to file penalty. If you do not file your tax return by the date it is due, you will have to pay a penalty of 5 percent of the tax for each month, or part of a month, the return is late. The minimum penalty is $5.00; the maximum penalty cannot be more than 25 percent of the unpaid tax. If you file your return late, you should figure the amount of the penalty and add it to the tax due.

Failure to pay penalty. If you do not pay the full amount of the tax due by April 15 and you do not have an extension of time for filing your return, you must pay a late payment penalty of 10 percent of the unpaid tax. If you have an extension of time for filing your return, the 10 percent penalty will apply on the remaining balance due if the tax paid by the due date of the return is less than 90 percent of the total amount of tax due. If the 90

percent rule is met, any remaining balance due, including interest, must be paid with the income tax return before the expiration of any extension period to avoid the late-payment penalty. The minimum penalty is $5.00. If your payment is late, figure the amount of the penalty and add it to the tax due.

APPENDIX O

--MEMORANDUM--

TO: Michael S. Hodges, Director
Individual Income Tax

FROM: George W. Boylan
Special Deputy Attorney General

DATE: April 10, 1989

SUBJECT: Davis v. Michigan Department of Treasury

In response to Davis v. Michigan Department of Treasury ("Davis"), ---U.S.--- (1989), you have requested our advice as to the following questions addressing the decision's implications for North Carolina individual income tax purposes:

1. Based on the Davis case, is the present North Carolina law with respect to taxing retirement pay of former Federal employees, including retired military personnel, constitutional because retirement pay of State and Local Government employees is exempt?

> I see no meaningful distinction between the Michigan Income Tax Act exempting retirement benefits paid by the State of Michigan and its political subdivisions, but levying an income tax upon retirement benefits paid by the federal government, and North Carolina's Individual Income Tax Act, affording similar exemptions to retired State and local employees, but taxing retirement incomes of federal

employees. Such disparity in treatment is unconstitutional within the rationale of Davis.

2. If taxing the retirement pay of former Federal employees is unconstitutional, are such taxpayers entitled to refunds of the State income tax paid on the Federal retirement benefits?

G.S. §§105-266, 105-266.1, 105-267 and 105-267.1 govern the refund of taxes. G.S. §105-267 prescribes the refund of taxes awarded pursuant to successful suit in superior court, and as I understand your question to address the situation of administrative refunds, it appears outside the scope of the Davis decision.

In Coca Cola Co. v. Coble, 293 N.C. 565 (1977), drawing upon previous decisions, the Supreme Court held that "taxes paid voluntarily and without objection or compulsion cannot be recovered, even though the tax be levied unlawfully." Id. at 567. In discussing the authority of the Secretary of Revenue to make refunds under G.S. §105-266.1, the Coca Cola Court held that such authority "extends only to the resettlement of taxes which he finds 'excessive or incorrect.'" Id. at 568. (Emphasis original). Continuing, the Court concluded that G.S. §105-266.1 "confers no authority on the Secretary to refund taxes which, at the time they were collected, were unlawful but 'not' erroneous or incorrect." Id. (Emphasis original). The Court found that its decisions "recognize a distinction between an erroneous tax and an invalid or illegal tax." Id.

Under G.S. §105-266, if the Secretary discovers from the examination of a return that a taxpayer has "overpaid the correct amount of tax," he is required to issue a refund. G.S. §105-266 closely parallels G.S. §105-266.1 which allows refunds after an administrative hearing where a tax has been found to be "excessive or incorrect." G.S. §105-267.1 permits "a head of the department" through which taxes were collected to refund them with the approval of the Attorney General if the taxes have been paid "through clerical error, or misinterpretation of the law, or otherwise,. . . in excess of the amount legally due the State,.

In my opinion, within the rationale of Coca Cola, G.S. §§105-266, 105-266.1 and 105-267.1 limit the ability of the Secretary of Revenue to make refunds to the situation of lawful or legally imposed taxes, collected in an excessive or incorrect amount, through clerical error, misinterpretation of law, or otherwise. Because taxes levied under an unconstitutional statute constitute "unlawful" taxes, the Secretary of Revenue is not authorized to refund any taxes imposed illegally upon retirement benefits of federal employees unless they were paid "involuntarily," as indicated by a demand for refund made within 30 days of payment.

3. If the former Federal employees are entitled to refunds for tax paid on the retirement benefits, under what circumstances and under what North Carolina statutes could the refunds be issued; what statute of limitations will apply to such refunds; and for which tax years may such refunds be made?

See above. Because an unconstitutional statute is considered void from inception, there is no distinction as far as eligibility for refund of taxes is concerned between payments received prior to a judicial declaration of unconstitutionality, and subsequent to such a decision. Therefore, no refunds may be issued with respect to taxes paid by retired federal employees after the decision in Davis was rendered unless they also were paid involuntarily within the rationale of Coca Cola.

4. If a taxpayer does not file a return or files a return and does not report amounts received as Federal retirement pay, should the Individual Income Tax Division assess the taxpayer for the tax due on the unreported retirement benefits?

Davis "mandates" equal treatment in the taxation or exemption of the retirement income of State and federal employees. The decision leaves as "a question of state law", whether equalization is to be achieved by extending an exemption to all State and federal retirees or by eliminating preferences for State and local employees. Selection of the appropriate action to bring North Carolina into compliance with Davis constitutes a policy determination to be made by the General Assembly, not an executive decision within the responsibility of the Secretary of Revenue. Consequently, absent any intervening judicial involvement, since the legislature has declared that State and local retirees are not to be taxed, the only recourse available to the Secretary of Revenue in order to eliminate discrimination is to remove the tax on federal retirement pay. In short

the Department of Revenue may not assess taxes upon unreported federal retirement benefits.

5. If a taxpayer files a return reporting Federal retirement benefits and before the due date of the return but not within 30 days of the payment of the tax and sends us a statement that the tax on such benefits is paid under protest and demands a refund of the tax paid, is the taxpayer entitled to a refund based on the Davis decision?

As discussed earlier, voluntary payments of taxes paid under an unconstitutional statute may not be refunded. A payment is voluntary within the meaning of G.S. §105-267 unless the sovereign is specifically advised otherwise in the form of a demand for refund. The demand must be made within 30 days of payment, regardless of when the tax is due. A demand for refund of taxes made more than 30 days after their payment is not a timely demand, and would not entitle a federal retiree to a refund of taxes.

GWB:jmc:davil.00

APPENDIX P

James G. Martin, Governor — Helen A. Powers, Secretary

THE GREAT SEAL OF THE STATE OF NORTH CAROLINA
NORTH CAROLINA
DEPARTMENT OF REVENUE

Release:	Immediately	Date:	4/13/89
Contact:	Myron C. Banks	Distribution:	Statewide
Release No:	90		

Secretary of Revenue Helen A. Powers announced today that Attorney General Lacy Thornburg has advised her that she has no inherent authority to refund taxes levied under an unconstitutional statute upon retirement benefits paid to retired federal employees, unless the taxes were paid involuntarily, as indicated by a demand for refund made within thirty days of payment. She asked for the Attorney General's opinion as a result of a recent United States Supreme Court decision in the case of Davis v. Michigan. A Michigan statute exempted state and local government retirement benefits from state income taxation, while providing no such exemption for similar federal retirement benefits, and North Carolina law is similar to that of Michigan, she said.

Federal retirees filing 1988 returns reporting federal retirement benefits who include a statement that the tax on federal retirement is paid under protest will receive refunds, as will those who submit written requests for refunds within thirty days of filing their returns. Miss Powers said that she will submit her recommendations for changes in the income tax law to the Legislature within ten days. Her recommendations will include the means of equalizing the tax treatment of retirees' benefits made necessary because of the Davis v. Michigan decision.

Public Information Office
P.O. Box 25000, Raleigh, N.C. 27640
(919) 733-7210

Myron C. Banks
Deputy Secretary of Revenue
Public Information Officer

An Equal Opportunity/Affirmative Action Employer

DRAFT

The Attorney General has advised me that under the North Carolina Supreme Court decision in Coca Cola Co. v. Coble, the Secretary of Revenue has no inherent authority under North Carolina law to refund an unconstitutional tax unless the taxpayer files a demand for refund within 30 days of the tax payment.

Although the United States Supreme Court recently decided in the Davis case that giving State and local government retirement benefits favorable tax treatment over Federal retirement benefits was not constitutional, taxpayers are not due refunds of North Carolina income tax paid on Federal civil service and military retirement benefits prior to the 1988 tax year unless they demanded a refund of the tax within 30 days of payment.

For the 1988 tax year, individuals may file their State income tax returns excluding the Federal retirement benefits. Taxpayers who file 1988 returns reporting the Federal retirement benefits and include a statement that the tax on the Federal retirement is paid under protest will receive refunds. Where taxpayers filed the 1988 return previously and reported the retirement benefits, they must have requested a refund within 30 days of filing the return to receive a refund of the tax paid on the Federal retirement benefits. Those who filed more than 30 days ago without protest will not receive refunds.

Although taxpayers will be denied refunds of tax paid on Federal retirement benefits in the circumstances explained above, they should understand that the Department of Revenue has no discretion to make the refunds since the Department is required to follow North Carolina law as enacted by the General Assembly and the decision of the North Carolina Supreme Court.

The Department of Revenue is currently in the midst of processing 1988 refunds and must give priority to these refunds over those refunds due resulting from Federal retirement benefits, which will be issued as soon as possible.

APPENDIX Q

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
P.O. Box 25000
RALEIGH, N.C. 27640

HELEN A. POWERS
Secretary

April 12, 1989

MEMORANDUM

TO: Revenue Officers, Field Auditors, and Income Tax Personnel

FROM: Michael S. Hodges, Director
Individual Income Tax Division

SUBJECT: Refund of North Carolina Income Taxes Paid on Federal Retirement Benefits

The Attorney General's Office has advised us that levying an income tax on retirement benefits paid by the Federal government, including benefits paid to retired military personnel, is unconstitutional, within the rationale of the recent United States Supreme Court decision in Davis v. Michigan Department of Treasury, since North Carolina's Individual Income Tax Act affords exemptions of such benefits paid to State and local governmental employees.

As to the taxpayers' right to refunds of taxes paid on Federal retirement benefits, the Attorney General has further advised that pursuant to a decision of the North Carolina Supreme Court in Coca-Cola Co. v. Coble, 293, N.C. 565 (1977), taxes levied under an unconstitutional statute such as in the present case constitute "unlawful" taxes. According to Coca-Cola, G. S. 105-267

prescribes the remedy for the refund of "unlawful" taxes. Under G. S. 105-267, the taxpayer must demand a refund of the tax within 30 days of the payment. We are not authorized to refund any taxes imposed upon retirement benefits of Federal employees unless they were paid "involuntarily" as indicated by a demand for refund within 30 days of payment.

Therefore, no refunds may be made on amended returns and requests for refunds for tax years prior to 1988 unless such amended returns and requests were received within 30 days of the payment of the taxes on the Federal retirement benefits. Refunds may be made on 1988 returns where the tax was paid on the Federal retirement benefits under protest as indicated by a statement filed with the return or a demand for refund filed within 30 days from the date the return was filed. We do not intend to assess taxes upon unreported Federal retirement benefits and in discussions with Federal retirees who have not filed their return, you should advise them that absent legislative changes by the General Assembly, they should not include the benefits on their return.

When a taxpayer has been denied a refund and asks how he may appeal, we should advise the taxpayer that the law confers no authority on the Secretary of Revenue to refund taxes which, at the time they were collected, were unlawful but not erroneous or incorrect. Any refund of such taxes must be made under the provisions of G. S. 105-267 which prescribe that a written demand for the refund must be made to the Secretary of Revenue within 30 days of the payment of the tax. Upon failure to receive the refund within 90 days, the taxpayer is entitled to sue the Secretary of Revenue in superior court for the amount demanded. Therefore, the relief, if any, to the taxpayer in this situation would be a question for the court.

With respect to refunds of taxes paid on Federal retirement benefits by estimated income tax payments or the application of excess tax withheld from wages including a spouse's withholding, the

payment is considered to have been made at the time the taxpayer files the return pursuant to the provisions of G. S. 105-152(e), 105-163.10, 105-163.15 and 105-163.16.

The following examples illustrate the income tax consequences of the Davis decision:

(1) A taxpayer whose only source of income was Federal retirement benefits pays estimated taxes of $100.00 on April 15, June 15, September 15 and January 15 for the tax year 1988. He files his return on February 15, 1989, reports the Federal retirement benefits and pays $400.00 additional tax due after taking credit for the estimated taxes paid. On April 2, 1989, he files amended returns for the tax years 1985, 1986, 1987 and 1988, excluding the Federal retirement benefits and requests refunds for each year including the $800.00 paid for 1988. In this case, we could not make the refunds including the 1988 refund since the taxpayer did not demand the refund within 30 days of the payment as required by G. S. 105-267. If the taxpayer had filed the amended returns on or before March 17, 1989, the demand for 1988 would have been made within 30 days and the refund of the $800.00 ($400.00 paid on estimated tax plus $400.00 paid with the return) must be paid to the taxpayer.

(2) The taxpayer pays $400.00 estimated income tax during the year based on the receipt of Federal retirement income and on April 15, 1989, files his return and does not report the retirement benefits and claims the $400.00 as an overpayment on the return. The taxpayer must be refunded the $400.00 and no adjustment may be made to include the retirement income in his gross income.

The estimated tax is credited against the taxes due at the time the return is filed.

(3) Assume the same facts as in (2) except the taxpayer files his return on September 30, 1989, and had an extension only to August 15, 1989. Filing the return after the due date or extended date would have no effect since the estimated taxes are credited against the taxes due at the time the return is filed.

(4) A taxpayer receiving Federal retirement benefits also had wages during the year subject to withholding. The taxpayer had additional tax withheld during the year to cover the tax due on the retirement benefits. Upon filing his return on March 1, 1989, the taxpayer reported the retirement income and offset the tax due against the tax withheld. A statement was sent with the return requesting a refund of the tax attributable to the retirement income. In this case, we must refund the overpayment since the tax withheld is credited against the tax due and deemed a payment at the time the return is filed.

(5) Assume the same facts as in (4) except the taxpayer did not include a demand for refund with the return but filed such demand on April 10, 1989. In this case, no refund on the retirement benefits may be made since the demand was not made within 30 days from the date the return was filed.

(6) A married individual filed his return on a combined form with his wife on March 25, reporting Federal retirement benefits. The tax due on the retirement benefits was offset by the tax

withheld on the wife's wages in excess of the tax due of the wife. On April 20, the taxpayers filed amended returns excluding the retirement benefits and requested a refund of the tax paid on such benefits. A refund must be made in this case since the demand was made within 30 days from the date of payment. (The application of the wife's excess withholding is deemed a payment of the taxpayer's tax due at the time the return is filed.) If the request for refund was made April 25th or after, no refund may be made.

(7) An assessment was proposed against the taxpayer on October 15, 1988, to tax unreported Federal retirement benefits. The taxpayer paid the assessment on November 14, 1988, and subsequent to Davis on April 2, sends a written claim for refund of the tax, penalties and interest paid in November, 1988. We may not make the refund since the demand was not made within 30 days from the date of payment.

(8) Assume the same facts as in (7) except the taxpayer's liability was $1,800.00 and the taxpayer obtained permission to pay the liability in installments of $300.00 each month, paying $300.00 on November 10, $300.00 on December 10, $300.00 on January 10, $300.00 on February 10 and $300.00 on March 10. On April 2, the taxpayer owed $300.00 on the liability and at that time made written demand that the assessment be cancelled and the payments already made be refunded to him. In this case, we may refund only the $300.00 payment made in March since the other payments were not made within 30 days of his demand for refund. We would not pursue collection of the balance due on the assessment.

(9) The taxpayer's Federal income tax return is audited and the taxpayer is allowed an additional interest deduction. As a result, the taxpayer files an amended North Carolina return adjusting the interest deduction and excluding Federal retirement benefits reported on his original return. The amended return reflected an overpayment of $1,200.00 of which $1,000 was the result of excluding Federal retirement benefits. In this case, only $200.00 may be refunded (the overpayment resulting from the increased interest deduction) since the Federal change would not affect the requirement of G. S. 105-267 that a demand for refund of "unlawful" taxes must be made within 30 days of the payment.

(10) A retired Federal employee was employed by the Department of Revenue for 3 years prior to his resignation on June 30, 1988. The taxpayer filed his North Carolina return on March 1, 1989, and reported his Federal retirement benefits and the lump sum payment received as a return of his contributions to the North Carolina Teachers and State Employees Retirement System. His payment of the tax due on the return included $800.00 because of reporting the Federal retirement and $500.00 because of reporting the State retirement benefits. On April 10, 1989, the taxpayer filed an amended return excluding both the Federal and State retirement benefits. In this case, we may not refund the $800.00 since it constitutes an "unlawful" tax and the request for refund was not made within 30 days as required by G. S. 105-267. We must refund the $500.00 since it is "erroneous" tax and the request was made within three years as required by G. S. 105-266.1.

APPENDIX R

April 14, 1989

Mr. Frank D. Titus
Assistant Director for Financial
Control and Management
Retirement and Insurance Group
Office of Personnel Management
1900 E. Street, NW
Washington, D.C. 20415

Dear Mr. Titus:

In response to your letter of April 6, 1989, we ask that you provide the Department of Revenue with a computer tape of retired Federal employees residing in North Carolina. Please mail the tape to us at Post Office Box 871, Raleigh, North Carolina 27602-0871.

Thank you for your assistance.

Very truly yours,

/s/ Michael S. Hodges
MICHAEL S. HODGES, Director
Individual Income Tax Division

MSH:nhj

bcc: Helen A Powers
Myron C. Banks
Niki Underwood
William O. Hunt

Blind Note: The U.S. Office of Personnel Management advised us by telephone that as of October 1, 1988, there were 41,960 retired Federal employees in North Carolina.

United States
OFFICE OF
PERSONNEL MANAGEMENT Washington, DC 20415

April 26, 1989

Mr. Michael S. Hodges
Director
Individual Income Tax Division
State of North Carolina
Department of Revenue
P.O. Box 25000
Raleigh, North Carolina 27640

Dear Mr. Hodges:

This is in response to your request dated April 15, 1989, for a current magnetic tape listing all civil service annuitants who live in North Carolina. The requested tape is furnished with this letter per your request.

Enclosed also is a technical description sheet for the tape giving the detailed specifications and the tape layout.

Please contact me if there are any questions about the tape at (202) 632-7450.

Sincerely,

/s/ Nelson T. Henderson
NELSON T. HENDERSON
Office of Financial Control
and Management

Enclosures
Technical Specs/Layout
Computer Tape OPM.STATEPOP.NC (029314)

NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 90 CVS 03127
NORMAN W. SWANSON, et al., individually and for the benefit and on behalf of all others similarly situated, Class A Plaintiffs, CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER and PAUL H. TURNEY, Class B Plaintiffs, vs. THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually as Secretary OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA, Defendants.	**AFFIDAVIT OF ROBERT J. BRANDEWIE**

STATE OF CALIFORNIA

COUNTY OF MONTERAY

Robert J. Brandewie, being first duly sworn on oath, deposes and states as follows:

1. I, Robert J. Brandewie, 99 Pacific Street, Monteray, California 93940, I am the Deputy Director of the Department of

Defense Manpower Data Center (DMDC) which is located in Monteray, California. This Center has computer data on all United States military personnel pay records, including retired personnel. This information is sent to us by each individual military service finance center on a quarterly basis.

2. By authorized exception to the Federal Privacy Act, this information in the form of computer tapes, with the data applicable to any state, can be made available to the duly authorized taxing authority of a state.

3. Tapes have been provided to the state's authorized taxing authority for the following states for utilization relative to Davis v. Michigan litigation: Virginia, Wisconsin, Kentucky, Iowa, Kansas, South Carolina, Oregon, Arkansas and Alabama.

4. Requests for this information must be made in written form, from the state's authorized taxing authority and should be sent to the Director, Department of Defense Manpower Data Center, Mr. Ken Scheflen, 4th Floor, 1600 North Wilson Boulevard, Arlington, Virginia 22209, with a copy to Mr. Mike Dove, Department of Defense Manpower Data Center, 99 Pacific Street, Suite 155A, Monteray, California 93940.

Further affiant saith not.

/s/ Robert J. Brandewie
ROBERT J. BRANDEWIE

Subscribed and Sworn to before me this
27th day of April, 1990.

/s/ Kristen D. Mastowski
Notary Public

My commission expires: 31 Aug 93

OFFICIAL SEAL
KRISTEN D. MASTOWSKI
NOTARY PUBLIC - CALIFORNIA
MONTEREY COUNTY
MY COMM. EXPIRES AUG 31, 1993

APPENDIX S

DEPARTMENT OF DEFENSE

MANPOWER DATA CENTER

* * *

March 2, 1994

Mr. G. Eugene Boyce
Womble Carlyle Sandridge & Rice
800 Wachovia Building
Raleigh, North Carolina 27601

Dear Mr. Boyce:

Here are the numbers you requested concerning the number of military retirees in North Carolina who have died since March 1989.

Number of Retirees in North Carolina in March 1989 -- 52,672

Number of Retirees who were in North Carolina in March 1989 who are in North Carolina in January 1994 --44,818

Number of Retirees who were in North Carolina in March 1989 who are not in North Carolina in Jan 1994 -- 3,136

Number of Retirees who were in North Carolina in March 1989 who are not on the January 1994 file -- 4,718

We hope these numbers will be beneficial in your endeavor to recover taxes imposed on federal retirees. If you have any questions about the above figures, or if you need additional information, please feel free to contact Matt Boehmer at (408) 655-0400.

Sincerely,

/s/ Deborah B. Eiselberg for

Michael Dove, Chief
Management Information
and Analysis Division

United States
Office Of
Personnel Management

March 8, 1994

G. Eugene Boyce
Womble, Carlyle, Sandridge & Rice
800 Wachovia Building
Raleigh, North Carolina 27801

Dear Mr. Boyce:

This is in response to your letter dated March 1, 1994 requesting information on the number of civil service retirees in North Carolina who have died since March 1989. According to our records, a total of 5,549 retirees from North Carolina have died between March 1989 and September 1993. Unfortunately we do not have either the number of retirees who moved into North Carolina after March 1989 or the number who may have moved out. The breakdown of deaths by fiscal year is:

1989	(March thru September)	700
1990		1,183
1991		1,121
1992		1,212
1993		1,333

I hope the information proves useful to you. Please contact Jim Fulton on 202-606-1271 if you have any questions or need further assistance.

Sincerely,

/s/ Doug Groft
DOUG GROFT
Chief
Budget and Program Information
Division

APPENDIX T

Samples of letter sent to legislators

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
P.O. Box 25000
RALEIGH, N.C. 27640

HELEN A. POWERS
Secretary

October 29, 1989

Exhibit 3
Powers
Deposition

The Honorable

Dear Senator

I suspect that you are receiving many questions from federal retirees about income tax refunds, just as I am. Since you have had so many issues to keep track of, I thought it might be useful to you to have some background information about the matter as you respond to their questions.

You will recall that on March 28, 1989, the United States Supreme Court decided Davis v. Michigan. Michigan law, like North Carolina, provided that State and local government pensions are exempt from income tax. The Supreme Court held that providing an exemption for those retirees while not providing a similar benefit for federal retirees was unconstitutional. The Court did not say that federal pensions must be exempt but rather that they must be treated no less favorably than state pensions.

Since it was apparent that many questions about refunds would arise during the height of the tax filing season, I promptly asked for an Attorney General's opinion, which I received on April 10.

It held, as I expected, that the Davis decision applied to North Carolina and that it pertained not only to federal civilian retirees, but to military retirees as well. More specifically, it found that the

North Carolina Supreme Court in Coca-Cola Co. v. Coble had dealt with the issue of refunds of taxes paid under a statute declared to be unconstitutional, and had held that the applicable refund statute, G.S. 105-267, required that such taxes be represented by a written request for refund made within thirty days after payment of the tax (which generally equates with the filing of the income tax return). I then forwarded a press release to all the major media, and informed our field offices so that federal retirees' questions could be dealt with by them.

There are a number of specific factual situations that have been found to apply to these retirees. For those who filed returns on and after February 26, it was possible for them to file "timely" requests for refunds, and for those who did so refunds of 1988 taxes have either been made or are in the process of being made. The Supreme Court decision, coming as it did near the end of the filing season, could hardly have come at a more difficult time, since these requests from federal retirees were received along with more than a million 1988 returns of other taxpayers due routine tax refunds which also had to be processed. Because the requests for refunds from federal retirees required considerable manual processing, it was determined that the 1988 refund returns would be processed first, and this was completed about July 5. Otherwise, several hundred thousand taxpayers would have experienced delays in obtaining their regular refunds. It was a difficult decision that I felt had to be made.

For those federal retirees who filed their returns early (in January, for example), none of them anticipated the Supreme Court decision by filing timely claims for refund, and of course by the date of the decision, March 28, it was too late to do so. It is, understandably, these taxpayers who have been the most upset about refunds. However, the statute, G.S. 105-267, the Coca-Cola case and the Attorney General's opinion answer the question in a way that is adverse to them, and I am obliged to follow the law.

Representative Albertson introduced House Bill 1350 to extend the time within which those claims could be filed. While it passed the House, it was not passed by the Senate. Consequently, this remains an important issue with federal retirees. This Bill will be eligible for consideration during the 1990 short session.

In addition, many federal retirees have asked for refunds for years prior to 1988, most going back three years, but others going back an indefinite number of years.

As you many know, there is a pending class action lawsuit in Federal court that seeks to have an adjudication of these refund issues. The suit was brought in April and is probably a very long way from final resolution. There are also two cases from other states pending in the United States Supreme Court that deal with the question of retroactive refunds. They have been argued once and will be reargued during the Fall Term. Since the Davis case did not deal with claims that had not been timely filed, presumably state law controls. However, I believe that either or both of the pending Supreme Court cases could go a long way in indicating whether the Coca-Cola decision represents the state of the law in North Carolina.

You may also recall that House Bill 1311 was enacted to provide for the uniform treatment mandated by Davis, beginning with 1989. The law maintains the present federal retiree exclusion at $4,000; reduces the exclusion for State and local government retirees from 100 percent to $4,000; and for the first time, established an exclusion of $2,000 for private pension benefits. These exclusions are not cumulative, if a pensioner receives more than one. In addition, the retirement formula was increased for State retirees to offset, at least in part the reduction in pension benefits that would occur from reducing the exclusion.

Although this explanation is more lengthy than I would have preferred, the issues are complex. I hope that this information

may be helpful to you in dealing with the questions being raised by many of your constituents.

Sincerely,

/s/ Helen A. Powers
HELEN A. POWERS
Secretary

HAP/ver

APPENDIX U

February 12, 1940.

Attention: Mr. C. K. Cooke.

Hon. A. J. Maxwell,
Commissioner of Revenue
Raleigh, North Carolina.

My dear Sir:

RE: INCOME TAXES - TAXABILITY OF COMPENSATION OF FEDERAL EMPLOYEES RECEIVED PRIOR TO ENACTMENT OF REVENUE ACT BUT AFTER JANUARY 1, 1939.

I reply to your letter of the 8th.

You ask my opinion whether the compensation of federal employees received prior to the enactment of the Revenue Act of 1939, but after January 1, 1939, is taxable under the Act.

The Public Salary Tax Act of 1939 gives the consent of Congress to non-discriminatory state taxation of the compensation of federal employees received after December 31, 1938. It was enacted April 12, 1939. L. Prentice-Hall, State & Local Tax Service, Income Taxes, Pgh. 92,038. See also Groves v. O'Keefe, and State Tax Commission of Utah v. Van Cott, decided by the United States Supreme Court March 29, 1939. L. Prentice Hall, State & Local Tax Service, Income Taxes, Pghs. 92,035 and 92,036.

The Revenue Act of 1939 was ratified March 24, 1939. Ch. 158, P.L. 1939. Article IV, Schedule D, of that Act levies a tax on net incomes of those subject thereto "for the year 1939 and each year thereafter." Section 310, 310, 313 and 326. "Gross Income" is expressly defined by Section 317 to include the salaries, wages or other compensation of federal officers and employees, provided that the compensation of state officers and employees are likewise taxes by the Federal Government. Such state compensation is taxed by the Federal Internal Revenue Code of 1939.

The United States Supreme Court also held that although our Revenue Acts are not enacted until the spring of the particular year, yet their provisions taxing incomes from January 1st of the year are valid and constitutional. A. C. L. Ry. vs. Doughton, 262 U.S. 413.

It is therefore my opinion that federal officers and employees are taxable on compensation received by them from the United States after December 31, 1938, and should make return of all such compensation received during the calendar year 1939 and that you should tax them accordingly.

Yours very truly,

Harry McMullan,
Attorney General

Assistant Attorney General

LOS:L

APPENDIX V

Deposition of B.W. Thomas
February 26, 1990
Raleigh, North Carolina

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Page 40 Lines 19-25/ Page 41 Lines 1-6, 14-19

Q: Okay. Were you aware at this time of a 30 day time limitation?

A: You mean at this present?

Q: As of the rendering of the Davis vs. Michigan decision were you aware of the 30 day time limitation?

A: No.

Q: When did you first become aware of that?

A: At the time that we received the Attorney General's ruling.

Q: And that was, what, April? Do you remember?

A: It was April the 10th.

Q: The 10th?

A: And I'm not sure of that.

Q: I hand you what's No. 3, Thomas deposition, Plaintiffs' No. 3. Is this the Attorney General ruling you're speaking of?

A: Right.

Q: And if you didn't know of the 30 day time limitation then I presume no one in your department was reminding taxpayers of the 30 day deadline or anything during this interim?

A: That's correct.

******

Page 60 Lines 22-25/Page 61 Lines 1-12

Q: Would it be difficult from ... strike that. Have you made efforts to obtain information from ... pertaining to military retirees from the Defense Manpower Data Center which is referenced in this Federation of Tax Administrators which was the Plaintiffs' Exhibit No. 15 in Mr. Hodge's deposition? It's in the highlighted portion of page 3.

A: I personally have not requested this, no.

Q: Do you know of any requests of information from ...

A: Yes, Mr. Hodges I think made this request and we actually have tape relating to that, yes.

Q: Did that tape allow you to identify the military retirees?

A: We have in our possession that tape. And as far as the tape is concerned, the tape hasn't been run or actually put in hard copy information.

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Page 70 Lines 6-21

Q: Are you familiar with the date stamping procedure at the Department of Revenue?

A: Yes, I think I can comfortably say that.

Q: All right. Are there some times when there is some dead time between the time you receive something and the time that the date is actually stamped on the front of it?

A: Actually, under the present system now, when a tax return is filed, we actually do not date stamp the return if it's filed before the April 15th or the deadline. And the reason for that is that the date is not significant to the department. After that, naturally we're interested in tax returns that are after the deadline due to late filing penalty or whatever. So that's the only time that we relate to date stamps.

Deposition of Carl G. Hayes
February 26, 1990
Raleigh, North Carolina

* * * * *

Page 12, Lines 4-12

Q: Do you recall ever telling anyone about a 30-day protest rule prior to Davis?

A: Prior to Davis, no.

Q: Were you aware of a 30-day protest rule prior to Davis?

A: The general statute we have I was aware of it, but I did not discuss it with any federal retirees.

Q: Do you recall that 30-day rule ever being used prior to the Davis situation?

A: Not that I recall.

* * * * *

Page 16, Lines 8-24

Q: All right. So you're saying that there's a letter that goes with a claim for refund? All I'm' trying to understand is what you thought qualified as a protest under the 30-day rule.

A: Okay. The taxpayers could file the claim for refunds on the amended form. A form D-400X was just a form they could take values, the figures from the original returns, just filled it out and requested a refund on an amended form. That was one way. Another way we were accepting it was in letter form. They did not have to submit the amended return. And the only thing that they needed to state in the letter was that either they were requesting a refund of the taxes paid on their federal retirement, that they protested the taxes paid on the federal retirement -- and I'm sure there's some other words that could be used but I can't recall them.

* * * * *

Page 21, Lines 6-15

Q: But as long as they're asking for a refund that's the basic thing you are looking for as to whether something constitutes protest in looking at your 30-day period? They may not have all the numbers in there, but as far as you are clear that they want a refund . . .

A: And it was not a requirement to have all the figures on the . . . in the letter or to even include their Social Security Number. As long as we could identify the taxpayer and they were requesting that refund of taxes paid, then we would consider that a claim.

* * * * *

Page 30, Lines 8-25

Q: What date controls the beginning of the 30-day period in your view that someone has to protest or demand a refund for declaring and paying income tax on federal pension benefits?

A: The date on the return or the date tax was paid.

Q: The date on the return? The date the person signs the return.

A: That he signs the return, right.

Q: So if someone signed a return January 10th and didn't put it in the mail until April 14th he was pretty much out of luck?

A: We have to go by the date the taxpayer signed the return because we don't have any way of determining elsewise *(sic)* when he mailed it. So that's the only date that we have on the return.

Q. You don't look at postmarks?

A. There's no postmark on the return.

Q. Well, there would be on the envelope, correct?

* * * * *

Page 31, Lines 1-25/Page 32, Lines 1-10

A. Yes.

Q. You look at the date the taxpayers signed the return regardless of when it was mailed, correct?

A. Well I don't do it myself.

Q. I understand that.

A. But we don't have the envelope or the postmark.

Q: Are you aware of any case prior to the Davis decision where a federal retiree demanded, I'm sorry, protested having to pay state income tax on his federal retirement benefits?

A: No.

Q: With your understanding of the law, if a federal retiree had protested prior to Davis would he have obtained a refund from the State of North Carolina?

A: Under the current law, a protest would have to be made according to an unconstitutional statute. And prior to the ruling, as far as our Department is concerned, out law was valid at that time.

Q; So a protest in 1985 of the fact that federal pensioner had to pay state income tax on those benefits wouldn't have gotten him anywhere would it? He wouldn't have gotten a refund would he?

A: That's a legal matter and I can't . . .

Q: Well, you said you would . . .

A: I wouldn't be able to determine if his protest would be acknowledged or whether he would receive a refund. Under current law we have a $3,000 exclusion. And based on the current law that's the only deduction that he would get from his federal retirement.

Q: Okay. And if he had just generally protested on principle, I don't like this, what if any action would the Department of Revenue had taken in response?

A: Prior to?

Q: Prior to Davis.

A: We would not issue a refund based on that claim.

Deposition of Helen A. Powers
February 28, 1990
Raleigh, North Carolina

******

Page 26, Lines 14-22

Q: Prior to that time, what was your understanding of 105-267?

A: That is the statute having to do with refunds that are made due to a court case or any statute that, even though it is an unconstitutional statute, that we still are not able to give them their refund unless they apply within the 30-day period as dictated in this Coca-Cola case.

Q: When did you first learn about the statute?

A: When this came up.

******

Page 62, Lines 24-25/Page 63, Lines 1-2

Q: . . . Let me ask you, did you have an understanding of what it would take in order for these retirees to perfect a demand for a refund? Did you have a personal understanding of what they must do?

A: No sir, I did not.

APPENDIX W

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OP NORTH CAROLINA
RALEIGH DIVISION
Case No. 89-282-CIV-5-H

NORMAN W. SWANSON, et. al.,	)
	)
Plaintiffs,	)
	)
v.	)DEFENDANTS' RESPONSE
	) TO INTERROGATORIES
HELEN A. POWERS, SECRETARY	)
OF THE NORTH CAROLINA	)
DEPARTMENT OP REVENUE, THE	)
NORTH CAROLINA DEPARTMENT OF	)
REVENUE and HARLAN BOYLES,	)
TREASURER OP THE STATE OF	)
NORTH CAROLINA,	)
	)
Defendants.	)

In accordance with Rule 33, F.R. Civ. P., and Local Rule 24.03, defendants Helen A. Powers and Harlan Boyles submit the following responses to Plaintiffs' First Set of Interrogatories. Each response separately and fully answers each interrogatory, except those to which objections have been made. I, B.W. Thomas, am responding to these interrogatories in my capacity as Chief for the Examination Section, Individual Income Tax Division, North Carolina Department of Revenue.

This the 31 day of May, 1989.

/s/ B.W. Thomas
B.W. THOMAS

3. Identify each person who has demanded a refund of taxes paid on his or her federal retirement benefits from 1985 to the present and state the date of each such demand.

RESPONSE Defendants maintain no telephone logs or other records of such conversations. They possess no records of oral requests for refund of taxes paid upon federal retirement benefits. If prior to Davis v. Michigan defendants ever received and answered any letter requesting refund of tax paid upon federal retirement income, the reply would have been placed with the file containing the individual's tax return. As explained in response to Interrogatory No. 1, defendants are unable to identify such taxpayers. Except as answered herein, defendants object to producing the information requested in Interrogatory No. 3 on the grounds that such information exceeds the scope of discovery established under Rule 26, and the effort required to produce the requested information would unreasonable, unduly burdensome and expensive.

* * * * * *

7. Describe fully and in detail the methods by which the defendants maintain records of: (a) persons from whom the defendants have collected income tax on federal retirement benefits from years 1985 to present; (b) demands for refunds of tax paid on federal retirement benefits, and (c) refunds made or refused for such taxes.

RESPONSE. For the period prior to the decision in Davis v. Michigan, defendants maintained no such records. With respect to the period after Davis, the Department of Revenue has followed the practices described in response to Interrogatory No. 1, above. Defendants' answer to Interrogatory No. 1 which is hereby incorporated by reference.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OP NORTH CAROLINA
RALEIGH DIVISION
Case No. 89-282-CIV-5-H

NORMAN W. SWANSON, et. al.,	)	
	)	
Plaintiffs,	)	
v.	)	DEFENDANTS' RESPONSE TO
	)	PLAINTIFFS' SECOND SET OF
HELEN A. POWERS, individually and as SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OP REVENUE and BOYLES, TREASURER OF THE STATE OP NORTH CAROLINA,)	)	INTERROGATORIES
	)	
Defendants.	)	

In accordance with Rule 33, F.R. Civ. P., and Local Rule 24.03, defendants Helen A. Powers and Harlan Boyles submit the following responses to Plaintiffs' Second Set of Interrogatories. Each response separately and fully answers each interrogatory, except those to which objections have been made. I, Helen A. Powers, am responding to these interrogatories in my capacity as Secretary of the North Carolina Department of Revenue.

This the 23 day of February, 1990.

/s/ Helen A. Powers
HELEN A. POWERS

17. In the context of N.C.G.S. §105-267, state when defendants contend that "payment" occurs and describe in detail the basis thereof.

RESPONSE. A payment occurs when the taxpayer delivers the payment to the North Carolina Department of Revenue or deposits it with the U.S. Postal Service for delivery to the Department. This position is based on the Department's policy of considering individual income tax returns as having been filed at the time of mailing to the Department.

A payment of income tax withheld or estimated income tax occurs when the return claiming credit for such amount is delivered by the taxpayer to the North Carolina Department of Revenue or is deposited with the U.S. Postal Service for delivery to the Department. This position is based on an oral opinion of Special Deputy Attorney General George W. Boylan rendered April 10, 1989.

APPENDIX X

UNITED STATES DISTRICT COURT
Eastern District of North Carolina
Raleigh Division
Case No. 89-282-CIV-5-H

NORMAN W. SWANSON, et al, individually and for the benefit and on behalf of all other similarly situated Plaintiffs, vs. HELEN A. POWERS, Individually as Secretary OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA, Defendants.	AFFIDAVIT OF JAMES T. AHLER

I, James T. Ahler, being first duly sworn, depose and say:

5. I am over the age of 18, have personal knowledge of the events set forth below and have no legal disabilities.

6. I am the Executive Director of the North Carolina Association of Certified Public Accountants.

7. A memorandum dated April 4, 1989, containing procedures for filing protective claims to preserve taxpayer's rights to refunds in response to the United States Supreme Court decision in Davis v. Michigan, was produced and distributed by the North Carolina Association of Certified Public Accountants and is attached hereto as Exhibit A. A copy of the March 29, 1989 *Wall Street Journal* article which accompanied the April 4, 1989 NCACPA memorandum is attached hereto as Exhibit B. A copy of the North Carolina Department of Revenue Instructions for filing protective claims which accompanied the April 4, 1989 NCACPA Memorandum is attached hereto as Exhibit C.

8. The instructions contained on the third page of the mailing (Exhibit C) are in fact the guidelines that were received by the North Carolina Association of Certified Public Accountants from staff at the North Carolina Department of Revenue.

9. In reliance on these instructions, the North Carolina Association of Certified Public Accountants prepared and mailed the attached memorandum (Exhibit A) to members of the North Carolina Association of Certified Public Accountants, cautioning them of a three (3)-year deadline within which to file protective claims for refunds of North Carolina State taxes paid on federal retirement incomes.

10. No thirty (30)-day deadline for demanding and/or filing refunds on State income taxes was ever mentioned by Michael S. Hodges or any other representative from the North Carolina Department of Revenue.

This the 15th day of March, 1990.

/s/ James T. Ahler
JAMES T. AHLER

Sworn to and subscribed before me
this the 15th day of March, 1990.

/s/ Rebecca G. Lorenzen
Notary Public

My Commission expires:

November 19, 1994

EXHIBIT A

CPA north carolina association of certified public accountants

CPA P.O. Box 80188 • Raleigh, N.C. • 27623-0188 • (919) 469-1040 • N.C. WATS (800) 722-2836 • FAX (919) 469-3959

IMPORTANT NOTICE

DATE: April 4, 1989

TO: Managing Partners, Shareholders and Sole Proprietors

FROM: Jim Ahler, Executive Director

The U.S. Supreme Court issued a March 28th ruling (Davis v. Michigan Department of Treasury) that state and local government pensioners cannot be taxed more favorably than federal pensioners. The case was remanded to the Michigan courts to decide whether to extend a state income tax exemption to retired federal employees (or all retired employees), or eliminate the exemption for retired state and local government employees. See enclosed photocopy of the March 29, 1989 Wall Street Journal article for more details.

States that similarly discriminate against federal pensioners are: Arizona, Colorado, Georgia, Louisiana, Maryland, Missouri, Montana, New York, North Carolina, Oregon, South Carolina, Virginia, West Virginia, and Wisconsin.

Also enclosed is information received from the North Carolina Department of Revenue regarding the filing of protective claims.

THE DEADLINE TO AMEND 1985 RETURNS EXPIRES APRIL 17, 1989. WE URGE YOU TO FILE PROTECTIVE REFUND CLAIMS FOR 1985 RETURNS OF FEDERAL RETIREES BEFORE THE DEADLINE.

JTA/dmd
Enclosures

B8 THE WALL STREET JOURNAL WEDNESDAY, MARCH 29, 1989

EXHIBIT B

Court Tells States to Tax Pensions Equally

Michigan Gave Exemption To State Retirees, Taxed Federal Pension Benefits

By Stephen Wermiel
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON -- The Supreme Court ruled that states are prohibited from discriminating against retired federal workers by taxing their pensions but not the retirement benefits of state employees.

The high court ruled that Michigan's income tax on federal retirement benefits violates a federal law that prohibits discriminatory taxes. Michigan exempts the retirement benefits of state employees from the state income tax.

The 8-1 decision, written by Justice Anthony Kennedy, will force Michigan and perhaps five other states to change their tax laws. According to the National Association of Retired Federal Employees, Arizona, Arkansas, Georgia, New York and Virginia have similar laws. The high court left it up to the states to decide whether to exempt federal retirement benefits or impose their income taxes on state benefits.

The case was begun in 1984 by Paul Davis, a retired lawyer for the federal government who lives in East Lansing, Mich. Mr. Davis paid Michigan taxes on his federal retirement benefits from 1979 through 1983 and then filed for refunds. When his request was rejected he sued, but the Michigan Court of Appeals upheld the tax in 1987.

In an unusual twist, Mr. Davis argued the case himself in the U.S. Supreme Court. He gained a strong ally along the way; the U.S. Justice Department joined in arguing on his side.

Mr. Davis was a Securities and Exchange Commission lawyer in the 1940s and 1950s, and was a hearing officer at the Department of Health, Education and Welfare and later the Department of Health and Human Services from 1974 to 1980, when he retired. Although he met Supreme Court qualifications for the right to argue cases there, he had never before done so.

The high court rejected Michigan's argument that the federal law applies only to current federal employees, not to retirees.

Justice John Stevens dissented, objecting to an "unjustified, court-imposed restriction on a state's power to administer its own affairs."

Yesterday, Mr. Davis said he was "pleased" with the ruling and "glad I got the chance to argue in the Supreme Court." He will be refunded $4,299, which he sought for the years in question. (*Davis vs. Michigan Department of the Treasury*)

•redacted (articles not relevant to Davis are not included)

NORTH CAROLINA DEPARTMENT OF REVENUE

Per discussion with Mr. Mike Hodges, Director of the Individual Income Tax Division of the North Carolina Department of Revenue, the matter has been referred to the North Carolina Attorney General's Office for interpretation.

However, in order to protect your client's rights, Protective Claims should be filed in the following manner:

1. A letter should be written to N.C. Department of Revenue which states the name, address and social security number of the taxpayer.

2. The letter should set forth the amount of federal pension included in North Carolina taxable income and request refund of the specific amount of North Carolina taxes paid on same.

3. The taxpayer must sign and date the letter.

The statute of limitations on amendments to the 1985 returns expires soon. Sam McEwen, in the Individual Income Tax Division, advises that Protection Claims must be postmarked no later than Monday, April 17th.

APPENDIX Y

AFFIDAVIT OF

RAY HOMESLEY

I, RAY HOMESLEY, Route 2, Box 340, Cherryville, North Carolina 28021, being first duly sworn, deposes and says: I am a federal retiree who has been required to pay North Carolina income tax on my Federal pension in violation of DAVIS v. MICHIGAN.

My demand for refund of North Carolina income tax collected on my pension for 1988 was denied by North Carolina Department of Revenue letter dated September 14, 1989, saying that "claims for refund....must be made within thirty days after payment."

The Department was completely wrong in looking at the facts in my case. Although my accountant prepared and dated my 1988 return on February 15, 1989 my wife and I reviewed it and waited until April 3, 1989 to sign and mail it and wrote our check #3245 dated April 3, 1989. See copy of check and endorsement showing that on April 4, 1989 "For Deposit Only North Carolina State Treasurer by Department of Revenue."

See also copy of my letter to North Carolina Department of Revenue dated April 17, 1989 claiming a refund of 1988 taxes paid on my Federal pension.

So, the true facts well known to the Department were: I filed 1988 return and paid tax on April 3, 1989, my check was endorsed by the Department on April 4, 1989, and I claimed refund on April 17, 1989, well within 30 days; in fact within 14 days!

I have recently written the North Carolina Department of Revenue to this effect. I have been without my refund for almost a year because of the ineptness and inefficiency of the Department.

Further Affiant says not.

/s/ Ray Homesley
RAY HOMESLEY

SHARON D. BESS
NOTARY PUBLIC
CLEVELAND COUNTY, N. C.
COMMISSION EXPIRES AUG. 23, 1991

SWORN AND SUBSCRIBED to before me

this 14th day of March, 1990

/s/ Sharon D. Bess
Notary Public

My Commission Expires: Aug. 23, 1991

Route 2, Box 340
Cherryville, N.C. 28021
April 17, 1989

Re: *1988*
North Carolina Individual Income
Tax Return - Ray & Marilyn N. Homesly
245 32 0568 497 30 9001
Filed April 3, 1989

Dear Sir:

Since I filed my tax return on April 3, 1989 I have learned that the U.S. Supreme Court has ruled that taxation of my Federal Civil Service Pension was unconstitutional.

As a result of including the Federal & Civil Service Pension on my 1988 Income Tax Return I paid a total tax of $2046.00. Without the inclusion of this pension I would have owed $2.64.

I am therefore requesting a refund of $2043.36.

Sincerely,

/s/ *Ray Homesley*
RAY HOMESLEY

/s/ *Marilyn N. Homesley*
MARILYN N. HOMESLEY

JAMES G. MARTIN
GOVERNOR

THE GREAT SEAL OF THE STATE OF NORTH CAROLINA

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE

HELEN A. POWERS
SECRETARY

P.O. Box 25000
RALEIGH, N.C. 27640

September 14, 1989

Ray & Marilyn N. Homesley
Rt. 2, Box 340
Cherryville, NC 28021

Dear Mr. and Mrs. Homesley:

This is in response to your request for a refund of the North Carolina income tax paid on your 1988 Federal retirement benefits as a result of the decision of the United States Supreme Court in Davis v. Michigan Department of Treasury. We regret the delay in our response but our personnel resources have not permitted us to respond earlier because of the large number of similar requests and the processing of current-year tax returns.

We have been advised by the Attorney General that claims for refund of taxes paid under an unconstitutional statute must be made within thirty days after payment (or if no payment is due under a return, within thirty days after the return was filed). Because your request for refund was not filed within that time, we do not have the authority to pay it. If the law is amended or interpreted by appropriate court decision so as to include your request, we will reconsider your claims for refund.

We will hold your 1988 request in suspense pending any future action. If you have filed refund claims for other years, we will respond to those requests at a later date.

Very truly yours,

H.M. Hickerson

/s/ H.M. HICKERSON, Tax Auditor
Individual Income Tax Division
(919) 833-4380

HMH/peb

RAY HOMESLEY 245-32-0568 3245
MARILYN N. HOMESLEY
RT 2 BOX 340 PH 435-6238
CHERRYVILLE, NC 28021

April 3, 1989

66 ■ 112
531

Pay To The Order Of N. C. Department of Revenue $ 21.00

twenty one and ---------- 00/100 Dollars

BB&T
BRANCH BANKING AND TRUST COMPANY
SHELBY, NORTH CAROLINA 28150

For

/s/ Ray Homesley

▸1:053101121▮:1703026024"○ 3245 /0000002100/

AFFIDAVIT OF

JERRY D. ROE

Jerry D. Roe, 709 Victory Lane, Hendersonville, N.C. 28739 being first duly sworn deposes and says:

I am a U.S. Federal retiree and have been required to pay N.C. income taxes on my federal retiree pension.

I filed my 1988 N.C. income tax return on February 11, 1989, paying tax on my 1988 federal retiree pension income as was required by North Carolina.

On February 28, 1989 I mailed to the N.C. Department of Revenue an amended 1988 N.C. income tax return, form DX 400, deleting my federal retiree income as non-taxable on the basis of Davis v. Michigan and that N.C. could not tax federal retiree income where it exempted state retiree pension income, and seeking tax refund as to my federal retiree pension income. This action was based upon my learning privately of the Davis v. Michigan case from a friend from Michigan who was passing through North Carolina.

When I did not shortly get a refund from North Carolina, I mailed additional amended returns to the same effect to N.C. Department of Revenue dated 4/14/89 and 5/30/89 respectively.

In the May-July 1989 period I got a telephone call from a representative of the N.C. Department of Revenue, apparently in response to the 4/14/89 mailed return. This N.C. Department of Revenue official advised me that my request for refund would be denied as I had not submitted the 4/14/89 amended return in time or within 30 days of payment. I asked that official about my amended return which I mailed to Revenue on 2/28/89 and another on 5/30/89. I was told that they - that is Revenue- could not find or did not have either of these but would keep looking for them.

On September 13, 1989, the N.C. Department of Revenue denied my request for 1988 refund of taxes paid on my 1988 federal retiree income paid to the State of North Carolina.

Attached are copies of referenced materials [redated from materials].

Further deponent says not:

/s/ Jerry D. Roe
JERRY D. ROE

SWORN AND SUBSCRIBED to before me this 12th of March, 1990.

/s/ Barbara H. Sampson
Notary Public

My Commission Expires: 8-7-91

[Redacted, attachments not included]

AFFIDAVIT OF

JAMES A. WAGNER

I, JAMES A. WAGNER, 118 Beechwood, Route 3, Morehead City, North Carolina 28557, being first duly sworn, deposes and says:

I am a federal retiree who has been required to pay North Carolina income tax on my Federal pension in violation of DAVIS v. MICHIGAN.

My demand for refund of North Carolina income tax collected on my pension for 1988 was denied by North Carolina Department of Revenue letter dated October 10, 1989 saying it was not filed within 30 days. This action was incorrect and North Carolina Department of Revenue was so advised in my letter of October 19, 1989.

I have not had the courtesy of a reply to that letter as of this date. I cannot understand why the Department took six months to respond to me the first time. Since their action was wrong I have written the Secretary of Revenue to inquire into the matter and take corrective action. It seems to me that it should not be necessary for me to prod the North Carolina Department to do what was obvious they should have done.

The facts are, I filed my 1988 tax return on April 10, 1989 and my Amended return claiming refund on April 29, 1989, well within the so called 30 day rule.

Further Affiant says not.

/s/ James A. Wagner
JAMES A. WAGNER

SWORN AND SUBSCRIBED to before me
this 23rd day of March, 1990.

/s/ Beverly J. Blaylock
Notary Public

My Commission Expires: March 21, 1993

[Redacted, attachments not included]

AFFIDAVIT OF

WILLIAM A. LOUDERMILK

WILLIAM A. LOUDERMILK, 207 East Cope Crk. Road, Sylva, NC, 28779, being first duly sworn, deposes and says:

I am a federal retiree who has been required to pay NC income tax on my federal pension in violation of DAVIS v. MICHIGAN.

~~I am a federal retiree who has been required to pay North Carolina income tax on my federal pension in violation of Davis v. Michigan.~~

My demand for refund of North Carolina income tax collected on my pension for the tax year 1988 was denied by NC Department of Revenue, letter dated September 28, 1989, copy enclosed.

This denial was incorrect, and there was no legitimate reason for it. All the department needed to do was to check the date stamps on my returns, and I would certainly assume they were date stamped. They said I did not file a request for refund within 30 days after payment was made. The facts are, I did comply with their so-called "30 day rule. " I filed my 1988 return on, or about, April, 1989 (my check is dated April 1, 1989), and filed D-400X amended return on, or about, April 8, 1989.

Because of inefficiency or bad faith in NC Department of Revenue I am still trying to get my refund. See letter to Mr. Hodges, Director, Individual Income Tax Division, copy enclosed.

Further Affiant says not.

/s/ William A. Loudermilk
WILLIAM A. LOUDERMILK

SWORN AND SUBSCRIBED to before me
this 15th day of March, 1990.

/s/ Denise L. Burrell
Notary Public

My Commission Expires: 11-24-93

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
P. 0. Box 25000
HELEN A. POWERS RALEIGH, N. C. 27640
SECRETARY

September 28, 1989

William A. & Mellie Loudermilk
207 E. Cope Crk. Rd.
Sylva, NC 28779

Dear Mr. and Mrs. Loudermilk:

This is in response to your request for a refund of the North Carolina income tax paid on your 1988 Federal retirement benefits as a result of the decision of the United States Supreme Court in Davis v. Michigan Department of Treasury. We regret the delay in our response but our personnel resources have not permitted us to respond earlier because of the large number of similar requests and the processing of current-year tax returns.

We have been advised by the Attorney General that claims for refund of taxes paid under an unconstitutional statute must be made within thirty days after payment (or if no payment is due under a return, within thirty days after the return was filed). Because your request for refund was not filed within that time, we do not have the authority to pay it. If the law is amended or interpreted by appropriate court decision so as to include your request, we will reconsider your claim for refund.

We will hold your 1988 request in suspense pending any future action. If you have filed refund claims for other years, we will respond to those requests at a later date.

Very truly yours,
R. W. Pollock, Tax Auditer
Individual Income Tax Division
(919) 733-7644

207 East Cope Crk. Road
Sylva, North Carolina 28779
March 12, 1990

Mr. Michael S. Hodges, Director
Individual Income Tax Division
NC Department of Revenue
Raleigh, North Carolina 27640

RE: William A. Loudermilk
SS 266 10 0934

Dear Mr. Hodges:

I have tried, without success, to obtain a refund of taxes unlawfully collected for 1988 on my federal pension.

Your department advised me on September 28, 1989 that I did not file a request for refund in a timely manner, to wit: within 30 days after payment was made. The facts are, I did comply with your rule. I filed my 1988 return on, or about, April 1, 1989 (my check is dated April 1, 1989), and filed D-400X amended return on, or about, April 8, 1989. Do not your date stamps show these approximate dates?

Because of the inefficiency or bad faith of your department, I am still trying to secure a refund to which I am clearly entitled of North Carolina income taxes on my federal pension for 1988.

You have had my money for about a year, and I have done my part to recover it, without success.

Will you please be fair; give some priority to my case, and try to make up for your inefficient or bad faith handling of this to date?

Sincerely,
/s/ William A. Loudermilk
WILLIAM A. LOUDERMILK

AFFIDAVIT OF

FINDLEY BURNS, Jr.

FINDLEY BURNS, Jr., 4 Village in the Woods, Southern Pines, NC, 28387, being first duly sworn, deposes and says:

I am a federal retiree who has been required to pay NC income tax on my federal pension in violation of DAVIS v. MICHIGAN.

I paid NC income taxes on my federal retiree pension income for tax year 1988 on April 3, 1989 only because I was advised by the NC Department of Revenue that I could be liable to heavy penalties if I failed to do so. I was specifically not advised either that I did not have to pay taxes thereon, or that such taxes could be paid under protest.

Details about this, and the handling of efforts to recover these funds, which it is now clear I did not have to pay to North Carolina except for NC Department of Revenue's incorrect advice to me, are as follows:

My wife and I filed our 1988 NC income tax return on April 3, 1989. Despite the U. S. Supreme Court decision in Davis v. Michigan/4USC111, we paid tax on my federal pension because I had been informed by telephone by the NC Department of Revenue that I could be liable to heavy penalties if I failed to do so.

On April 6, 1989, we filed for a refund of that portion of the 1988 tax corresponding to my federal pension, citing the aforementioned Supreme Court decision. When, after three months, I had heard nothing from the NC Department of Revenue, I commenced telephoning the Refund Office of the NC Department of Revenue, to be assured each time that I would shortly be receiving a refund.

When, by late October 1989, no refund had been received, I asked to speak to an officer of the NC Department of Revenue who could help solve the matter of my refund. I was connected with Mr. E. S. Koonce who proved helpful. He found that there was no record of our form D-4OOX of April 6, 1989 claiming the refund.

On October 31, 1989, I sent Mr. Koonce a xerox copy of the aforementioned form D-400X, together with xerox copies of the Post Office Certification of the transmittal and the receipt signed by the NC Department of Revenue.

A few days later Mr. Koonce telephoned to say I would be receiving a refund in a week to ten days. After waiting three weeks, I telephoned Mr. Koonce to report I had not received a refund. He promptly investigated and found the refund check had gotten stuck somewhere in the machinery of the NC Department of Revenue. He extracted the check and had it mailed that very day. The refund check was received by me on November 22, 1989. No interest for late payment was included (which I understand is due if refund is more than six months delayed), but I did not have the stomach to pursue the matter further.

On April 6, 1989, my wife and I had filed refund applications for the tax paid on my federal pension for 1985, 1986 and 1987. These were transmitted separately from the 1988 refund application.

On December 7, 1989, I wrote to the NC Department of Revenue to ask them to confirm that they had received our forms D-400X for 1985, 1986 and 1987. Fearing I would never receive a reply to my letter of December 7, 1989 (and as of this date I have <u>not</u> had a reply), I telephoned Mr. Koonce shortly after December 7, 1989 regarding the matter. He investigated, and reported that the NC Department of Revenue could locate only two of the three refund applications. On December 13, 1989, I sent Mr. Koonce copies of our forms D-400X for 1985, 1986 and

1987, together with copies of the Post Office Certification of transmittal and receipt signed by the NC Department of Revenue. No further action has been taken on these.

Further Affiant says not.

/s/ Findley Burns, Jr.
FINDLEY BURNS, JR.

SWORN AND SUBSCRIBED to before me

this 15th day of March, 1990.

/s/ Lore H. Salmon
Notary Public

My Commission Expires 12/16/90

[Redacted, attachments not included]

AFFIDAVIT OF

JAMES D. TERRELL

JAMES D. TERRELL, 2701 Arendell, Morehead City, NC 28557, being first duly sworn, deposes and says:

> I am a federal retiree who has been required to pay NC income tax on my federal Pension in violation of DAVIS v. MICHIGAN.

In early April 1989 some information came to me through private sources that the United States Supreme Court case of Davis v. Michigan ruled that states could not do this unless they treated state employee retirees the same way. There was no official NC Department of Revenue publication about this.

For this reason, about April 5, 1989 I wrote a letter to the NC Department of Revenue. I asked Revenue if I was required to pay estimated tax on my federal retiree pension since the Davis v. Michigan case had come out. A few days later, a Mr. Hayes of the NC Department of Revenue called me explaining the Department of Revenue's dilemma, and that they could furnish no written reply to my letter at that time. Mr. Hayes advised me to file my estimated tax return report for the first quarter of tax year 1989 based on the tax regulations existing at that time. He said he believed the General Assembly would resolve the tax issue in a very short time. Based on Mr. Hayes advice for the NC Department of Revenue, I sent in estimated taxes for the first quarter of 1989 on my federal retiree pension.

I have, since April 15, 1989, been advised by an attorney that I did not, in fact, legally have to pay or forward 1989 estimated NC income tax on my federal retiree income because of the Davis v. Michigan case. This attorney has advised me further

that Mr. Hayes' and the Department of Revenue's advice to the contrary was legally incorrect, and in error.

I did not pay estimated NC income tax on my federal retiree pension for the second and third quarters of 1989 as these quarters arrived.

I heard nothing further from the NC Department of Revenue until about October 1989 when I received the attached letter from that Department dated October 13, 1989. This, it appears, is the written answer to my original letter seeking written guidance from them about April 5, 1989.

Further Affiant says not.

/s/ James D. Terrell
JAMES D. TERRELL

SWORN AND SUBSCRIBED to before me
this 14 day of March, 1990.

/s/ Ray Bowl
Notary Public

My Commission Expires 3-7-93

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
P. O. BOX 25000
HELEN A. POWERS RALEIGH, NC 27640
Secretary

October 13, 1989

James D. Terrell
2701 Arendell
Morehead City, NC 28557

Dear Mr. Terrell:

We have received your inquiry concerning your estimated income tax payments for the tax year 1989 as a result of the decision of the United States Supreme Court in Davis v. Michigan Department of Treasury. We delayed responding to your request until the General Assembly had addressed the issue of the taxation of Federal retirement benefits.

On August 12, 1989, the General Assembly ratified House Bill 1311 to allow a retired Federal, State or local government employee to exclude from taxable income up to $4,000 of the retirement benefits received each year, effective January 1, 1989. In the case of a married couple filing a joint return where both spouses received separate retirement benefits from one or more state, local, or federal governmental plans, a $4,000 exclusion is allowed separately for the benefits received by each spouse.

Since the $4,000 exclusion is the same as the exclusion for federal retirement benefits provided under prior State law, estimated income tax payments based on that exclusion would be correct under the new law. In addition, G.S. 105-163. 16(c) provides that no refunds for overpayment of estimated tax shall be made by the Secretary of Revenue prior to the date that a final return is filed by the taxpayer. Therefore, the amount of estimated tax paid for the

1989 tax year should be claimed on your 1989 income tax return and any refund due will be issued after the return is filed.

If you have filed refund claims for other years, we will respond to those requests at a later date. Please let me how if you have any questions or need additional information.

Very truly yours,

/s/ Carl G. Hayes
CARL G. HAYES
Administrative Officer
Individual Income Tax Division
(919) 733-4684

CGH/gb

An Equal Opportunity/Affirmative Action Employer

AFFIDAVIT OF

BENTON FIELDER, JR.

I, BENTON FIELDER, JR., 36 Pine Grove Drive, Andrews, North Carolina 28901, being first duly sworn, deposes and says:

I am a federal retiree and have been required to pay North Carolina income tax on my Federal retiree pension.

During late March/early April, 1989, I was trying to get information as to how DAVIS v. MICHIGAN, a recent U. S. Supreme Court decision, affected federal retiree taxation by North Carolina and refund procedures for North Carolina income taxes paid on Federal retiree income for 1988 and prior years.

To this purpose, I contacted a Mr. Fred Sharkey, a North Carolina Department of Revenue representative, in the local office at Murphy, North Carolina. I was advised by him in late March/early April, 1989 officially "to do nothing until the State advised or decided what to do." In preparation for making this affidavit I contacted Mr. Fred Sharkey again to confirm this and he, on February 26, 1990, stated to me that while he did not recall our particular conversation of late March/early April, 1989, that he did confirm that he made statements to people like me making inquiries at that time "to do nothing until the State advised or decided what to do." This continued until guidance was finally provided to him through his channels at a later time by the State.

I ultimately filed North Carolina amended tax returns to try to secure refunds of North Carolina income taxes on Federal retiree pensions taxed by North Carolina. I have not been able to secure such refunds though these amended returns were filed within the three year period allowed for such as stated for refunds and amended returns as published in the North Carolina tax form instructions for taxpayers for 1988 and 1989.

Further Affiant says not.

/s/ Benton Fielder, Jr.
BENTON FIELDER, JR.

SWORN AND SUBSCRIBED to before me
this 14th day of March, 1990

/s/ Charles O. Van Garden III
Notary Public

My Commission Expires: September 13, 1993

STATE OF NORTH CAROLINA
DEPARTMENT OF REVENUE
P. O. BOX 25000
HELEN A. POWERS RALEIGH, N.C. 27640
SECRETARY September 25, 1989

Benton & Anna M. Fielder, Jr.
36 Pine Grove Drive
Andrews, NC 28901

Dear Mr. & Mrs. Fielder:

This is in response to your request for a refund of the North Carolina income tax paid on your 1988 Federal retirement benefits as a result of the decision of the United States Supreme Court in Davis v. Michigan Department of Treasury. We regret the delay in our response but our personnel resources have not permitted us to respond earlier because of the large number of similar requests and the processing of current-year tax returns.

We have been advised by the Attorney General that claims for refund of taxes paid under an unconstitutional statute must be made within thirty days after payment (or if no payment is due under a return, within thirty days after the return was filed). Because your request for refund was not filed within that time, we do not have the authority to pay it. If the law is amended or interpreted by appropriate court decision so as to include your request, we will reconsider your claim for refund.

We will hold your 1988 request in suspense pending any future action. If you have filed refund claims for other years, we will respond to those requests at later date.

Very truly yours,
/s/ A. P. Stephenson
A. P. STEPHENSON, Tax Auditor
Individual Income Tax Division
(919) 733-4301

AFFIDAVIT OF

ROBERT J. FARRELL

ROBERT J. FARRELL, 734 River Oaks Lane, Charlotte, NC, 28226, being first duly sworn, deposes and says:

I am a federal retiree who has been required to pay NC income tax on my federal pension in violation of DAVIS v. MICHIGAN.

I have been incorrectly denied refund of North Carolina income taxes paid by me on my federal retiree pension for 1988 by NC Department of Revenue letter, dated September 25, 1989. I am entitled to this refund even under the so-called North Carolina "30 day rule."

Examination of the original of my 1988 tax return will reflect that it was dated on or about April 11, 1989, and must have been received by the State of North Carolina shortly thereafter. I am satisfied that this is about the date that it was mailed.

At that point in time, I was about to depart out of the country to Germany and was wrapping up personal business prior to departure.

At about this same general time, on or about April 4, 1989, private talk, but no official NC Revenue guidance, was going around about the effect of a recent United States Supreme Court decision as to the non-taxability of federal retiree income in North Carolina. I decided to file an amended 1988 NC income tax return to claim refund of taxes paid on my federal pension in 1988. I did this by filing a Form D-400X, 1988 amended return, copy enclosed, dated April 4, 1989. This was mailed about this date. I also filed amended returns for 1985-1987, also on April 4, 1989.

The confusion about dates, my original return being dated April 11, 1989, and all of my amended returns (1988-1985) being dated April 4, 1989, was based on my being uninformed as to procedures (no state information was put out) and I had to act on the private information I had as I was on the way out of the country and rushed by all of this. It is clear that both an original and amended return for 1988 were filed by me on April 11 and April 4, 1989 and this certainly meets any so-called "30 day rule." There was, and is, no legitimate basis for denying my refund as to 1988.

I am enclosing pertinent documents. You can see from these and the above, and from examination of official records, that I am entitled to refund even under any "30 day rule." This should be clear now and originally to the NC Revenue Department; there is no excuse for their keeping my money, denying my refund, and Revenue's September 25, 1989 letter.

Further Affiant says not.

/s/ Robert J. Farrell
ROBERT J. FARRELL

SWORN AND SUBSCRIBED to before me

this 14 day of March, 1990.

/s/ Elizabeth A. Tatum
Notary Public

My Commission Expires: 1-19-93

State of North Carolina
County of Mecklenburg

[Redacted, attachments not included]

APPENDIX Z

James G. Martin
Governor

The Great Seal of the State of North Carolina

STATE OF NORTH CAROLINA
Office of the Governor

Release: IMMEDIATE
Contact: Nancy Pekarek, Joanne Latham

Date: August 3, 1992
Distribution: Statewide

GOVERNOR REPORTS STRENGTHENING OF FISCAL YEAR END BUDGET RESERVE

RALEIGH -- Governor Jim Martin today reported that the State ended its fiscal year (FY) June 30, 1992, with a balance of $164.8 million in the General Fund. That compares with a year-end balance of $441,000 in (FY) 1991. These amounts represent the amount of cash actually collected and on hand but not spent by the state.

"We ended the last fiscal year with almost nothing left in the State's coffers, especially when you consider that it costs about $50 million a day out of the General Fund to keep government operating," Governor Martin said. "This year, we have a $164.8 million balance going into fiscal year 1992-93, which means the General Fund is much healthier than it was last year."

Net operating figures for FY 1991-92 improved substantially over FY 1990-91. Total revenue increased by $634.3 million (8.6%) while expenditures increased by only $248.2 million (3.3%).

Tax revenue for FY 1992 totalled $746 million more than in FY 1991 (an 11% increase), primarily because of $479.1 million in increased sales and use taxes, and an increase of $161.5 million in income taxes.

Unlike previous years, revenue estimates for FY 1992 proved to be very accurate. Actual tax collections reached 100.1% of budget projections. All revenue, including fees, receipts, and investment income, totalled 99.9% of the amount budgeted. The shortfall was more than offset by reduced expenditures.

"The 1% sales tax increase and improvement in other tax collections, coupled with a slowdown in the growth of expenditures, made FY 1992 a much better fiscal year than FY 1991," State Controller Fred W. Talton said. "The Office of State Budget and Management and the Legislative Fiscal Research Office should be commended for accurately estimating revenues for fiscal year 1992."

At the recommendation of Gov. Martin, the 1991 General Assembly enacted legislation requiring consensus revenue projections by these two offices to be used in adopting the state budget.

The General Assembly reduced transfers from the Highway Trust Fund to the General Fund by $61.1 million from 1991. In 1991, the Office of State Budget and Management was forced to increase transfers from other funds to the General Fund in order to overcome a $729 million revenue shortfall that year. The total amount of such transfers in FY 1992 was $112.7 million less than in FY 1991.

While current operating expenditures for both FY 1991 and FY 1992 include funds for 12 months of payroll costs, salaries earned by certain employees in June of each year are paid after the beginning of the next fiscal year. That practice was adopted in FY 1990 as a response to a $550 million revenue shortfall. The total amount of deferred salaries was approximately $329 million in FY 1992.

A condensed summary of operations for fiscal year end 1991 and 1992 follows (expressed in millions):

	1992		1991	
	Actual	Budget	Actual	Budget
Revenues:				
Taxes	$7,438.6	$7,433.1	$6,692.6	$7,357.4
Non--taxes	172.9	181.3	184.9	214.0
Transfers in from other funds	205.6	211.3	387.7	281.1
Bond proceeds	157.5	157.5	75.0	75.0
Total revenues	7,974.6	7,983.2	7,340.2	7,927.5
Expenditures:				
Current operations	7,108.3	7,277.4	6,870.6	7,178.3
Capital improvements	157.5	157.5	181.4	282.3
Local government tax reimbursements	468.2	478.2	445.4	476.8
Debt service	75.8	79.7	64.6	71.3
Other	0.4	0.4	0.0	0.0
Total expenditures	7,810.2	7,983.2	7,562.0	8,008.7
Excess (deficiency) of revenues over expenditures	164.4	0.0	(221.8)	(81.2)
Fund Balance:				
At beginning of year	0.4	0.4	222.2	222.2
At end of year	$ 164.8	$ 0.4	$ 0.4	$ 141.0

Triangle Business Journal, July 12, 1993

State surplus would cover tax liability

By CARRICK MOLLENKAMP

-- RALEIGH

A $350 million surplus in state coffers would be available to cover damages should the state lose a pending tax case in N.C. Supreme Court.

The surplus, which represents approximately 4 percent of the state budget, comes from two items: $200 million in revenue over collections and $150 million in unspent appropriations.

That money is more than enough to cover the $140 million sought by federal retirees who claim their benefits were taxed at a higher rate than state retirees during the 1980s.

But if the state is ordered to refund the taxes -- or if a compromise is reached -- it would debilitate plans to spend the surplus on one-time capital improvements. The possibility of using the money in fiscal 1993-94 currently is under debate in the General Assembly.

Two weeks ago, the U.S. Supreme Court ruled that states should pay back federal retirees who paid millions of tax dollars while state retirees were given more favorable tax breaks. The court remanded the case back to the N.C. Supreme Court, which will consider it this fall. The pending case revolves around whether the state's 30-day grievance policy allows due process to the taxpayer.

A decision for the 100,000 plaintiffs who stand to win an estimated $1,400 per person likely would hurt the stat budget. Still, North Carolina is in a better position than cash-strapped states such as Virginia, which faces a $489 million payoff if it loses in that state's high court.

The hand-wringing question in Virginia, which might face a $500 million shortfall in its 1994-96

budget, "is whether one party gets a windfall at the expense of all Virginia taxpayers," Mary Sue Terry, former Virginia attorney general, told The Associated Press. "The fairness issue cuts both ways."

Although the Virginia case is slated for the fall, top state officials already are eyeing options. Virginia Gov. L. Douglas Wilder has said in press reports that he would like a fall referendum to allow Virginians to decide how to settle the issue.

The discussion on the issue in North Carolina has been a bit more discreet. Legislators contacted by this journal indicated that the case was too far in the future to be debated now. But insiders said "intense" briefings were held between legislative leaders following the U.S. Supreme Court decision two weeks ago.

Meanwhile, attorneys for the plaintiffs last week filed to move the case from N.C. Supreme Court to Wake County Superior Court. It was there in trial court in 1990 that the plaintiffs originally won their case. The N.C. Attorney General's Office, not unexpectedly, answered that it opposed a change of venue.

MILITARY RETIREES MAKE GOOD NORTH CAROLINA CITIZENS

MARCH 1993

THE RETIRED OFFICERS ASSOCIATION
NORTH CAROLINA COUNCIL OF CHAPTERS

EVERY COUNTY IN NORTH CAROLINA BENEFITS FROM THE $6.2 BILLION SPENT BY THE DEPARTMENT OF DEFENSE

The citizens in all 100 counties of North Carolina benefit from money received from the Department of Defense. Military retirees live in every county and their most of their retirement pay is spent in that county. Many counties, such as Guilford and Brunswick counties, receive most of their payments from contacts received by industries in their area. The reduction of expenditures by the military agencies will increase pressure to maintain current income in each county. Attracting military retirees is the most cost effective way to maintain that income.

EXCERPT FROM DoD ATLAS--FY 1989

DoD ESTIMATED PAYROLL AND PRIME CONTRACTS BY STATE
(THOUSANDS OF DOLLARS)
FISCAL YEAR 1989

State	North Carolina
Civilian Pay	414,439
Military Active Duty Pay	2,258,954
Reserve & National Guard Pay	116,264
Retired Military Pay	671,972
Total Compensation	3,461,629
Civil Functions Contracts	2,414
Military Functions Contracts	1,101,328
Total Contracts	1,103,742

Greensboro News & Record, Friday, May 13, 1994

Hunt says no to tax cut this year

The Associated Press

RALEIGH - If business people had any illusions the Legislature would cut corporate taxes or intangibles taxes this year, they knew better Thursday after a series of meetings with Gov. Jim Hunt and legislative leaders.

"It is true we're not the lowest tax state," Hunt told about 200 members of North Carolina Citizens for Business and Industry. "You can't be the lowest tax state and have the university system we have, the community college system we have ... and the Smart Start program for children that we have."

House Speaker Dan Blue and Senate President Pro Tem Marc Basnight delivered the same message in their appearances before the group.

Legislators return for a budget-adjustment session May 24 with nearly a billion dollars in unspent money to allocate. Half of that amount is in tax collections that exceeded projections and is likely to reoccur next year. The other half is money returned unspent by state agencies, which can be spent on one-time expenses like equipment. With so much money available, business lobbyists saw a chance to get the corporate income tax cut or the intangibles tax - a tax on stocks, bonds and other investments that goes to local government - rolled back this year.

"There has been a lot of talk of tax cuts," Hunt said. "I think I see the time coming when we ought to be looking at that.

"I think we will find a time in the not too distant future when we ought to get that back down," he said. "But I do not recommend it in this session."

Blue pointed out that legislators in the last year have cut business unemployment tax payments by $300 million, more than the increase in corporate taxes approved in 1991 when the state faced tight economic times.

In answer to a question, Blue said the House might consider some version of a workers compensation bill passed by the Senate last year. The Senate version, which was drawn up

by business lobbyists, would have reversed several court decisions that increased compensation for injured workers.

"We're eager to reach a solution to runaway costs in workers compensation, to consider tax relief," said Blue, D-Wake. "But the focus of a budget session should be the budget."

APPENDIX AA

The State/Columbia, S.C. Thursday, March 10, 1994

Attorneys for federal retirees say they deserve $16 million fee

By LEVONA PAGE
Senior Writer

CONWAY

A Surfside Beach law firm gambled its time and reputation to get an $85 million state tax refund for federal retirees and deserves the $16 million fee it is requesting, five attorneys testified Wednesday.

If the firm gets the fee it is requesting, other law firms will be more willing to take on cases that seem to defy all odds, Wisconsin attorney Eugene Duffy said. That will benefit anyone whose constitutional rights are denied, he said.

* * *

If the federal retirees had sued individually to get refunds, their costs for filing fees alone would have been $38 million, Connell testified. In addition, there would have been printing costs and other expenses.

The average refund to retirees under the class-action lawsuit will be about $2,500 to $3,000, the attorneys said. If the 19.5 percent fee is awarded by Master-in-Equity John Breeden, each retiree will pay about $500 to $600 in attorneys' fees.

[Redacted; only relevant portions included]

APPENDIX BB

1989 (Reg. Sess., 1990) SESSION C. 1002

CHAPTER 1002
SENATE BILL 1084

AN ACT TO CONFORM THE LAWS OF NORTH CAROLINA TO THE REQUIREMENTS OF CERTAIN FEDERAL LAWS AND CONSTITUTIONAL PRINCIPLES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 105-115 is repealed.

Sec. 2. G.S. 105-134.6(b)(4) is repealed.

Sec. 3. This act is effective for taxable years beginning on or after January 1, 1990.

In the General Assembly read three times and ratified this the 20th day of July, 1990.

/s/ James C. Gardner
JAMES C. GARDNER
President of the Senate

/s/ J.L. Mavretic
J. L. MAVRETIC
Speaker of the House of Representatives

Session Laws - 1989

H.B. 1311 CHAPTER 792

AN ACT TO PROVIDE INCOME TAX EXEMPTIONS FOR ALL RETIREES AND TO INCREASE STATE AND LOCAL RETIREMENT BENEFITS.

The General Assembly of North Carolina enacts:

Part I.

Retirement Tax Exemptions.

Section 1.1. G.S. 105-134.6(b), as enacted by Chapter 728 of the 1989 Session Laws, is amended by adding a new subdivision to read:

"(6) a. An amount, not to exceed four thousand dollars ($4,000), equal to the sum of the amount calculated in subparagraph b. plus the amount calculated in subparagraph c.

b. The amount calculated in this subparagraph is the amount received during the taxable year from one or more state, local, or federal government retirement plans.

c. The amount calculated in this subparagraph is the amount received during the taxable year from one or more retirement plans other than state, local, or federal government retirement plans, not to exceed a total of two thousand dollars ($2,000) in any taxable year.

d. In the case of a married couple filing a joint return where both spouses received retirement benefits during the taxable year, the maximum dollar amounts provided in this subdivision for various types of retirement benefits apply separately to each spouse's benefits."

APPENDIX CC

Refunds Pre-Harper	Refunds or Settlement Negotiations Post-Harper		No Refunds No Settlement
Arizona	Alabama	Montana	North Carolina
Michigan	Arkansas	New Mexico	New York
Missouri	Colorado	Oklahoma	Kentucky[2]
	Iowa	Oregon	Georgia
	Kansas	South Carolina	Virginia[3]
	Louisiana	Utah	
	Minnesota[1]	West Virginia	
	Mississippi	Wisconsin	

1 Minnesota is not a federal retiree case, but one remanded "in light of Harper."

2 Kentucky is litigating procedural (two year vs. four year statute of limitations), rather than constitutional, questions.

3 Georgia and Virginia are struggling toward settlement.

APPENDIX DD

LIST OF PARTIES TO THE PROCEEDING

Petitioners

Federal Pensioners--Class A

Norman W. Swanson
Henry F. Murray
Carl L. Whitney
William E. Nicholson, III
Charles A. Dancy
Melvin F. Eyerman
Ira N. Schwarz
John L. Powell, Jr.
Galina Elworth
Donald V. Wallace
William E. Denton
Robert A. Nisbet
Walter J. Bartnikowski
Ralph P. Hunt
Marion B. Zollicoffer
William H. Talbert
Billy Clark
Wallace M. Davis
Grady L. Strange
Hamilton M. Howe
Mary L. Pritchard
Robert B. Campbell
Browning Adams
Pritchard G. Adams
William H. Adams
Edward H. Allen
Flossie P. Allen
Joseph A. Allen
Rachel C. Allred
Helen L. Anctil
Leo I. Anctil
Ronald E. Anderson
Clarence P. Armstrong
Carroll W. Austin
F. L. Austin, Jr.
Donald P. Bahr
Paul Ballus
Charles D. Barker, Sr.
Walter E. Barkhouse
Edward C. Barret
James L. Baxter
Russell W. Beard
Bernard L. Beatty
Richard K. Bell
Leo E. Benade
Sherman W. Betts
Joseph H. Betz
Robert L. Blevins
Dranklin M. Blunt
Timothy C. Bolick
Margaret C. Boone
Henry A. Botkin
Alex Bourdas
Ola May (Tate) Bovender
Eugene A. Bowen
Lavaune K. Breda

Marlowe G. Breda
Trond G. Brekke
Laura B. Brendle
Millard Bridgers
Clarence M. Bridges
Doris K. Bridges
Cyrus H. Brooks, Jr.
Daniel R. Brown
K. A. Brown
William D. Brown
Betty P. Bullock
Robert S. Bullock
Findley Burns, Jr.
Ray G. Burrell
Richard E. Bush
James M. Byrne
Norman L. Carlton
Matthew E. Carmean
Frank Cates
J. Crawford Caton
Harry E. Chamberlain
Vincent H. Chase
Paul F. Chavez
Woodrow H. Childress
John G. Church
Herman L. Clanton
Robert L. Clarke
Charles C. Clausen, Sr.
Dennis E. Cleckner
Steve P. Clemenic
Lacy W. Coates
Rucia A. Cobb
James A. Coddington
Catheryn S. Coley
Laura K. Conder
James C. Conine
Marshall G. Cooper
Asbury Coward, III
Newton P. Cox
Ruth A. Cox
Burnette E. Creasman
Thomas J. Culkin
Hazel B. Curlee
Milton L. Dail
Beatrice G. Davis
Bernley S. Davis
Donald M. Davis
Essie M. Davis
George E. Davis
Robert J. Davis
Clifford H. Dawson
Calvin F. Dean
Orien G. Dean, Jr.
Jack M. Deaton
Violet B. Deitmaring
Arlen J. Devito
John E. Devlyn
Sara E. Devlyn
Joy E. Dickinson
Mrs. Leroy B. Dickinson
James E. Diffee
Delbert R. Dillon
Margaret H. Dopf
Raymond E. Dopf
Leroy M. Duffy
Charles F. Dupont
Bobby R. Eason
David Edmisten
Carl L. Effler
John H. Elder, Jr.
John R. Ellis
Manford G. Farr
Rita Festo
John J. Filan

Angelo A. Florentino
Robert W. Folden
Oscar F. Fowler
Melvin W. Fritz
Walton E. Fulcher
Robert C. Fuller
Walter E. Fuller
Frank W. Furches
Norman Carl Gaddis
Marshall L. Gaddy
Thomas B. Gardiner
Robert F. Geissler
William E. Gentner, Jr.
Thomas P. Ginn
Robert W. Goodman
John R. Gordon
Bernice C. Grandy, Jr.
Steven W. Grandy
Robert J. Green
Michael R. Greeson
James H. Griffin
Thomas M. Groome, Jr.
James W. Gross
Arthur S. Gunderson
Hert L. Hancock, Jr.
James M. Hardin
C. Lee Harris
Howard W. Harris
Paul H. Harvey
Roland R. Hatcher
Henry S. Heffley, Jr.
Carroll A. Hefner
Clarence J. Hensley, Jr.
Richard M. Heriot
Doris T. Herring
Novis S. Herring
Virginia R. Hildebrand
Mozelle L. Hinshaw
Herman J. Hipps
Rufus M. Hodgin
Donald R. Hoffman
Charles K. Hoffmeyer
Mary R. Holland
Edgar P. Holt
Ray Homesley
Ned A. Hood
Robert H. Hood
Stephen W. Hopkins
Clyde L. Howard, Jr.
Kevin G. Huges
Harvey R. Hurst
Sam P. Hyatt
John L. Irby
Mattie B. Ives
Francis Jacobs
Richard L. Jarrett
Jacqueline M. Jennings
Woodrow W. Jones
Donald L. Jorgenson
Kenneth R. Joseph
Patsie W. Joseph
Everette R. Keller
Bernard J. Kelley
Wilson P. Lemp
Howard Lee Kerr
Margaret C. Kerr
William S. Ketner
David L. G. King
Thomas M. King, Jr.
Evelyn W. Kinney
John E. Kirk
Paul E. Kirkland, Sr.
Raymond B. Kleber
George M. Knobl, Jr.

William F. Knopf
Max V. Krebs
William J. Kuhn, Jr.
James M. Langston, Jr.
Jane W. Langston
Elmer L. Lashua
John L. Latham
Daniel M. Lauderback
August R. Lawrence
Freida H. Lewis
Norwood P. Lewis
Henry G. Liles
Dorothy J. Liles
Walter E. Linthicum
Phyllis V. Lippard
George Lott
Robert P. Lucas
Allen M. Mabe
Thomas S. Maceluch
William F. Marcuson, Jr.
Warner G. Maupin
Lylton E. Maxwell
Oliver A. Mays
Andrew G. Mayse
Samuel S. McCachren
Elizabeth S. McCaskill
Elizabeth G. McDonald
Clyde W. McKirk
Donald D. McGuire
Norman H. McLaughlin
Doy W. McPhail
William Ray Medlin, Jr.
Ernest E. Miller
Margaret H. Miller
Edgar N. Millington
Harold J. Mitchener
Eugene E. Moody
Dorothy C. Moore
James C. Moore, Jr.
Lucie E. Moorman
Robert M. Moose
Jack B. Morris
Regena E. Morrison
Stanley B. Morse
Woodford T. Moseley
George R. Muse
R. J. Nettles
Thomas G. Newport
John E. Nitsche
Alfred P. Norwood
Johnnie M. Ochoa
Elvin E. Oglesby
Oliver G. Oja
Russell E. Olson
Lloyd A. Osborne
Paul B. Osgood
William C. Page
Lee R. Paramore
Lewis W. Pate
Charles R. Patton
Vernon J. Peebles
W. W. Pegues
Mary E. Penn
John D. Penn
Elliotte T. Perkins, Jr.
William H. Perry, Jr.
Paul J. Phillippi
Richard L. Phillips
Ruby A. Phillips
Frank J. Piazza, Sr.
Dallas Pickard, Jr.
George A. Pinter
Edward W. Piper
Frederick H. Pless

R. F. Hoke Pollock, Jr.
Lewington S. Ponder
Elbert Y. Poole
Jennette C. Poole
Martha Boyce Poteat
Edwin H. Price
Charles R. Pugh
Daniel J. Quesenberry
Milton H. Quinn
Louise M. Rabbino
Thomas M. Ramsey
Jack G. Ray
Marshall G. Ray
Hazel S. Redmon
George R. Reinhart, III
Annie E. Renkel
Madge O. Reynolds
Franklin E. Richardson, Jr.
Allen W. Rigsby
George M. Roberts
Jennings B. Robinson
James P. Roth
Phifer P. Rothman
Harold E. Ruble
Hilda H. Rultenberg
Donald E. Russell
George W. Sabo
Lyle E. Samson
Robert L. Scheer
Frederick L. Schuerman, Sr.
Robert J. Schullery
Elwood M. Shaulis
Robert T. Sheridan
Stanley T. Shipley
Charles B. Shivley
Charles A. Shue, Jr.
Ruth M. Shue
Elsie N. Simmons
Frederick E. Simmons
Mary B. Simpson
Manuel F. Siverio
Joseph A. Sizoo
Evelyn S. Smith
George B. Smith
James A. Smith
James E. Smith
James P. Smith
Joe F. Smith
Percy H. Smith
Joseph L. Sommer
Ray H. Spangler
James A. Sprankle
Wiley L. Standifer, Jr.
James W. Starbuck
Gertrude D. Starling
Stacy J. Starling
Henry C. Steed, Jr.
Roy C. Steeley
Arthur L. Stewart
Burlena J. Stewart
John R. Stewart, Jr.
George W. Stillway
Rita M. Stillway
Harold E. Stone
Clyde Dalton Stowe
Harry H. Strunk
E. C. Stumpf
Thomas A. Summey, Jr.
Ellis G. Sumner
Leo B. Sumner
Mildred Y. Sumner
Margaret K. Swink
James E. Sykes
Oliver B. Talbert

James D. Terrell
Clyde E. Thompson
Emogene M. Thompson
Fred L. Tracy
Rocco H. Trombello
John G. Truitt, Jr.
William H. Turk
James T. Vance
Frances A. Vanden
George W. Vanden
Ethel D. Vanhorn
Edward J. Vaughn
Edward Venkler
Roy L. Vick, Sr.
Kermit J. Vinson
Myrtle H. Vinson
William E. Wade
Floyd H. Waldrop
Wanda E. Wallace
Roland J. Weber
Grace F. Weiner
Lona C. Weisner
Lawrence O. Welch
Paul B. Welch, Jr.
George L. Westerlind
William B. White
T. M. Whittington, Jr.
George W. Wilkins
Robert S. Williams, Jr.
William C. Williams
Winton H. Williams
Harold P. Williamson
Edna Mae Wilson
Robert Graves Wilson, Jr.
Ernest G. Winstead
Peter S. Wondolowski
Robert V. Wood
Maynard B. Woodbury
Evelyn W. Woodbury
Jack R. Worley
John T. Worrell
George T. Worrell
George E. Yale, Jr.
William P. Yarborough

Federal Military Personnel–Class B

Charles L. Berry
Milton S. Price
Robert D. Lennon
Martin L. Speicher
Zebulon V. Moseley, III
Paul H. Turney
Gary W. O'Neal

Respondent

Helen A. Powers, former Secretary of Revenue of the State of North Carolina

Other Defendants Not Directly Involved in Appellate Decision

North Carolina Department of Revenue, Harlan Boyles, Treasurer of the State of North Carolina

APPENDIX EE

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

WAKE COUNTY — 90 CVS _____

NORMAN W. SWANSON, HENRY F. MURRAY, CARL L. WHITNEY, WILLIAM E. NICHOLSON, III, CHARLES A. DANCY, MELVIN F. EYERMAN, IRA N. SCHWARZ, JOHN L. POWELL, JR., GALINA ELWORTH, DONALD V. WALLACE, WILLIAM E. DENTON, ROBERT A. NISBET, WALTER J. BARTNIKOWSKI, RALPH P. HUNT, MARION B. ZOLLICOFFER, WILLIAM H. TALBERT, BILLY CLARK, WALLACE M. DAVIS, GRADY L. STRANGE, HAMILTON M. HOWE, MARY L. PRITCHARD, ROBERT B. CAMPBELL, BROWNING ADAMS, PRITCHARD G. ADAMS, WILLIAM H. ADAMS, EDWARD H. and FLOSSIE P. ALLEN, JOSEPH A. ALLEN, RACHEL C. ALLRED, HELEN L. and LEO I. ANCTIL, RONALD E. ANDERSON, CLARENCE P. ARMSTRONG, CARROLL W. AUSTIN, F.L. AUSTIN, JR., DONALD P. BAHR, PAUL BALLUS, CHARLES D. BARKER, SR., WALTER E. BARKHOUSE, EDWARD C. BARRET, JAMES L. BAXTER, RUSSELL W. BEARD, BERNARD L. BEATTY, RICHARD K. BELL, LEO E. BENADE, SHERMAN W. BETTS, JOSEPH H. BETZ, ROBERT L. BLEVINS, FRANKLIN M. BLUNT, TIMOTHY C. BOLICK, MARGARET C. BOONE, HENRY A. BOTKIN, ALEX BOURDAS, OLA MAY (TATE) BOVENDER, EUGENE A. BOWEN, LAVAUNE K. BREDA, MARLOWE G. BREDA, TROND G. BREKKE, LAURA B. BRENDLE, MILLARD BRIDGERS, CLARENCE M. BRIDGES, DORIS K. BRIDGES, CYRUS H. BROOKS, JR., DANIEL R. BROWN, K.A. BROWN, WILLIAM D. BROWN, BETTY P. BULLOCK, ROBERT S. BULLOCK, FINDLEY BURNS, JR., RAY G. BURRELL, RICHARD E. BUSH, JAMES M. BYRNE, NORMAN L.

COMPLAINT

[Filed: March 16, 1990]

CARLTON, MATTHEW E. CARMEAN, FRANK)
CATES, J. CRAWFORD CATON, HARRY E.)
CHAMBERLAIN, VINCENT H. CHASE, PAUL F.)
CHAVEZ, WOODROW H. CHILDRESS, JOHN G.)
CHURCH, HERMAN L. CLANTON, ROBERT L.)
CLARKE, CHARLES C. CLAUSEN, SR.,)
DENNIS E. CLECKNER, STEVE P. CLEMENIC,)
LACY W. COATES, RUCIA A. COBB, JAMES)
A. CODDINGTON, CATHERYN S. COLEY,)
LAURA K. CONDER, JAMES C. CONINE,)
MARSHALL G. COOPER, ASBURY COWARD, III,)
NEWTON P. COX, RUTH A. COX, BURNETTE)
E. CREASMAN, THOMAS J. CULKIN,)
HAZEL B. CURLEE, MILTON L. DAIL,)
BEATRICE G. DAVIS, BERNLEY S. DAVIS,)
DONALD M. DAVIS, ESSIE M. DAVIS,)
GEORGE E. DAVIS, ROBERT J. DAVIS,)
CLIFFORD H. DAWSON, CALVIN F. DEAN,)
ORIEN G. DEAN, JR., JACK M. DEATON,)
VIOLET B. DEITMARING, ARLEN J. DEVITO,)
JOHN E. DEVLYN, SARA E. DEVLYN, JOY E.)
DICKINSON, MRS. LEROY B. DICKINSON,)
JAMES E. DIFFEE, DELBERT R. DILLON,)
MARGARET H. DOPF, RAYMOND E. DOPF,)
LEROY M. DUFFY, CHARLES F. DUPONT,)
BOBBY R. EASON, DAVID EDMISTEN, CARL)
L. EFFLER, JOHN H. ELDER, JR., JOHN R.)
ELLIS, MANFORD G. FARR, RITA FESTO,)
JOHN J. FILAN, ANGELO A. FLORENTINO,)
ROBERT W. FOLDEN, OSCAR F. FOWLER,)
MELVIN W. FRITZ, WALTON E. FULCHER,)
ROBERT C. FULLER, WALTER E. FULLER,)
FRANK W. FURCHES, NORMAN CARL GADDIS,)
MARSHALL L. GADDY, THOMAS B. GARDINER,)
ROBERT F. GEISSLER, WILLIAM E.)
GENTNER, JR., THOMAS P. GINN, ROBERT)
W. GOODMAN, JOHN R. GORDON, BERNICE C.)
GRANDY, JR., STEVEN W. GRANDY, ROBERT)
J. GREEN, MICHAEL R. GREESON, JAMES)
H. GRIFFIN, THOMAS M. GROOME, JR.,)
JAMES W. GROSS, ARTHUR S. GUNDERSON,)
HERT L. HANCOCK, JR., JAMES M. HARDIN,)
C. LEE HARRIS, HOWARD W. HARRIS,)
PAUL H. HARVEY, ROLAND R. HATCHER,)

HENRY S. HEFFLEY, JR., CARROLL A.)
HEFNER, CLARENCE J. HENSLEY, JR.,)
RICHARD M. HERIOT, DORIS T. and NOVIS)
S. HERRING, VIRGINIA R. HILDEBRAND,)
MOZELLE L. HINSHAW, HERMAN J. HIPPS,)
RUFUS M. HODGIN, DONALD R. HOFFMAN,)
CHARLES K. HOFFMEYER, MARY R. HOLLAND,)
EDGAR P. HOLT, RAY HOMESLEY, NED A.)
HOOD, ROBERT H. HOOD, STEPHEN W.)
HOPKINS, CLYDE L. HOWARD, JR., KEVIN)
G. HUGHES, HARVEY R. HURST, SAM P.)
HYATT, JOHN L. IRBY, MATTIE B. IVES,)
FRANCIS JACOBS, RICHARD L. JARRETT,)
JACQUELINE M. JENNINGS, WOODROW W.)
JONES, DONALD L. JORGENSON, KENNETH)
R. JOSEPH, PATSIE W. JOSEPH, EVERETTE)
R. KELLER, BERNARD J. KELLEY, WILSON)
P. KEMP, HOWARD LEE KERR, MARGARET C.)
KERR, WILLIAM S. KETNER, DAVID L.G.)
KING, THOMAS M. KING, JR., EVELYN W.)
KINNEY, JOHN E. KIRK, PAUL E.)
KIRKLAND, SR., RAYMOND B. KLEBER,)
GEORGE M. KNOBL, JR., WILLIAM F. KNOPF,)
MAX V. KREBS, WILLIAM J. KUHN, JR.,)
JAMES M. LANGSTON, JR., JANE W.)
LANGSTON, ELMER L. LASHUA, JOHN L.)
LATHAM, DANIEL M. LAUDERBACK, AUGUST R.)
LAWRENCE, FREIDA H. and NORWOOD P.)
LEWIS, HENRY G. and DOROTHY J. LILES,)
WALTER E. LINTHICUM, PHYLLIS V.)
LIPPARD, GEORGE LOTT, ROBERT P. LUCAS,)
ALLEN M. MABE, THOMAS S. MACELUCH,)
WILLIAM F. MARCUSON, JR., WARNER G.)
MAUPIN, LYLTON E. MAXWELL, OLIVER A.)
MAYS, ANDREW G. MAYSE, SAMUEL S.)
MCCACHREN, ELIZABETH S. MCCASKILL,)
ELIZABETH G. MCDONALD, CLYDE W. MCKIRK,)
DONALD D. MCGUIRE, NORMAN H. MCLAUGHLIN,)
DOY K. MCPHAIL, WILLIAM RAY MEDLIN,)
JR., ERNEST E. MILLER, MARGARET H.)
MILLER, EDGAR N. MILLINGTON, HAROLD J.)
MITCHENER, EUGENE E. MOODY, DOROTHY C.)
MOORE, JAMES C. MOORE, JR., LUCIE E.)
MOORMAN, ROBERT M. MOOSE, JACK B.)

MORRIS, REGENA E. MORRISON, STANLEY B.)
MORSE, WOODFORD T. MOSELEY, GEORGE R.)
MUSE, R.J. NETTLES, THOMAS G. NEWPORT,)
JOHN E. NITSCHE, ALFRED P. NORWOOD,)
JOHNNIE M. OCHOA, ELVIN E. OGLESBY,)
OLIVER G. OJA, RUSSELL E. OLSON,)
LLOYD A. OSBORNE, PAUL B. OSGOOD,)
WILLIAM C. PAGE, LEE R. PARAMORE,)
LEWIS W. PATE, CHARLES R. PATTON,)
VERNON J. PEEBLES, W.W. PEGUES,)
MARY E. and JOHN D. PENN, ELLIOTTE T.)
PERKINS, JR., WILLIAM H. PERRY, JR.,)
PAUL J. PHILLIPPI, RICHARD L. PHILLIPS,)
RUBY A. PHILLIPS, FRANK J. PIAZZA, SR.,)
DALLAS PICKARD, JR., GEORGE A. PINTER,)
EDWARD W. PIPER, FREDERICK H. PLESS,)
R.F. HOKE POLLOCK, JR., LEWINGTON S.)
PONDER, ELBERT Y. POOLE, JENNETTE C.)
POOLE, MARTHA BOYCE POTEAT, EDWIN H.)
PRICE, CHARLES R. PUGH, DANIEL J.)
QUESENBERRY, MILTON H. QUINN, LOUISE M.)
RABBINO, THOMAS M. RAMSEY, JACK G. RAY,)
MARSHALL G. RAY, HAZEL S. REDMON,)
GEORGE R. REINHART, III, ANNIE E.)
RENKEL, MADGE O. REYNOLDS, FRANKLIN E.)
RICHARDSON, JR., ALLEN W. RIGSBY,)
GEORGE M. ROBERTS, JENNINGS B.)
ROBINSON, JAMES P. ROTH, PHIFER P.)
ROTHMAN, HAROLD E. RUBLE, HILDA H.)
RULTENBERG, DONALD E. RUSSELL, GEORGE)
W. SABO, LYLE E. SAMSON, ROBERT L.)
SCHEER, FREDERICK L. SCHUERMAN, SR.,)
ROBERT J. SCHULLERY, ELWOOD M. SHAULIS,)
ROBERT T. SHERIDAN, STANLEY T.)
SHIPLEY, CHARLES B. SHIVELY, CHARLES A.)
and RUTH M. SHUE, JR., ELSIE N. and)
FREDERICK E. SIMMONS, MARY B. SIMPSON,)
MANUEL F. SIVERIO, JOSEPH A. SIZOO,)
EVELYN S. SMITH, GEORGE B. SMITH,)
JAMES A. SMITH, JAMES E. SMITH, JAMES)
P. SMITH, JOE F. SMITH, PERCY H. SMITH,)
JOSEPH L. SOMMER, RAY H. SPANGLER,)
JAMES A. SPRANKLE, WILEY L. STANDIFER,)
JR., JAMES W. STARBUCK, GERTRUDE D.)

STARLING, STACY J. STARLING, HENRY C.)
STEED, JR., ROY C. STEELEY, ARTHUR L.)
STEWART, BURLENA J. STEWART, JOHN R.)
STEWART, JR., GEORGE W. STILLWAY,)
RITA M. STILLWAY, HAROLD E. STONE,)
CLYDE DALTON STOWE, HARRY H. STRUNK,)
E.C. STUMPF, THOMAS A. SUMMEY, JR.,)
ELLIS G. SUMNER, LEO B. and MILDRED Y.)
SUMNER, MARGARET K. SWINK, JAMES E.)
SYKES, OLIVER B. TALBERT, JAMES D.)
TERRELL, CLYDE E. and EMOGENE M.)
THOMPSON, FRED L. TRACY, ROCCO H.)
TROMBELLO, JOHN G. TRUITT, JR.,)
WILLIAM H. TURK, JAMES T. VANCE,)
FRANCES A. VANDEN, GEORGE W. VANDEN,)
VANDEN, ETHEL D. VANHORN, EDWARD J.)
VAUGHN, EDWARD VENKLER, ROY L. VICK,)
SR., KERMIT J. VINSON, MYRTLE H.)
VINSON, WILLIAM E. WADE, FLOYD H.)
WALDROP, WANDA E. WALLACE, ROLAND J.)
WEBER, GRACE F. WEINER, LONA C.)
WEISNER, LAWRENCE O. WELCH, PAUL B.)
WELCH, JR., GEORGE L. WESTERLIND,)
WILLIAM B. WHITE, T.M. WHITTINGTON,)
JR., GEORGE W. WILKINS, ROBERT S.)
WILLIAMS, JR., WILLIAM C. WILLIAMS,)
WINTON H. WILLIAMS, HAROLD P.)
WILLIAMSON, EDNA MAE WILSON, ROBERT)
GRAVES WILSON, JR., ERNEST G. WINSTEAD,)
PETER S. WONDOLOWSKI, ROBERT V. WOOD,)
MAYNARD B. and EVELYN W. WOODBURY,)
JACK R. WORLEY, JOHN T. WORRELL, GEORGE)
T. WORRELL, GEORGE E. YALE, JR.,)
and WILLIAM P. YARBOROUGH,)
individually for the benefit and on)
behalf of all other similarly situated,)
)
Class A Plaintiffs,)
)
vs.)
)
CHARLES L. BERRY, ROBERT D. LENNON,)
ZEBULON V. MOSELEY, III, GARY W.)
O'NEAL, MILTON S. PRICE, MARTIN L.)

SPEICHER and PAUL H. TURNEY, individually and for the benefit and on behalf of all others similarly situated,	)
Class B Plaintiffs,	)
vs.	)
THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually as Secretary OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA,	)
Defendants.	)

NOW COME the Plaintiffs, by and through counsel, complaining of the Defendants allege and say as follows:

INTRODUCTION

This is an action brought on behalf of (1) all former federal employees, ("Class A Plaintiffs") and (2) all active duty federal military personnel and reservists ("Class B Plaintiffs") now residing and paying income tax to the State of North Carolina ("the State").

First, Plaintiffs challenge the State's income tax laws and policies under which the State (1) taxes former federal employee retirement benefits while exempting from the same tax liability retirement benefits of former state and local government employees, and (2) taxes federal compensation of active duty military personnel and reservists while exempting from the same tax liability $1,500 per year of compensation benefits received by the members of the North Carolina National Guard and Militia. Such taxation is in violation of 42 U.S.C. § 1983, the Public Salary Tax Act of 1939 (4 U.S.C. § 111), the constitutional

doctrine of intergovernmental tax immunity, the supremacy clause of Art. VI, Sec. 2, the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution, and Art. I, Sec. 19, and Art. V, Sec. 2 of the Constitution of the State of North Carolina.

Second, Class A Plaintiffs, former federal employees, sue pursuant to N.C.G.S. §§ 105-266, 105-266.1, 105-267 and 105-267.1, and any other statute in Chap. 105, whether specifically alleged herein or not, to recover refunds of state income taxes paid for the tax years 1985 through 1988.

On March 28, 1989, in Davis v. Michigan Dept. of Treasury, 57 U.S.L.W. 4389, 109 S. Ct. 1500, 103 L.Ed.2d 891 (March 28, 1989), the United States Supreme Court held that it is a violation of 4 U.S.C § 111 for a state to tax the retirement benefits of former federal employees while exempting from state income tax the retirement benefits of former state and local government employees. The Court further held that such tax treatment violates the constitutional doctrine of intergovernmental tax immunity.

JURISDICTION AND PARTIES

1. This Court has jurisdiction to adjudicate claims under 42 U.S.C § 1983 to redress deprivations made under color of state law of rights secured by the Constitution and laws of the United States. This Court has jurisdiction pursuant to Article 26, Chapter 1 of the General Statutes of North Carolina to adjudicate claims for declaratory and injunctive relief. This Court has original jurisdiction to adjudicate issues of State constitutional claims. Further, this Court has jurisdiction to adjudicate claims for refunds of taxes paid pursuant to, among other legal means, N.C.G.S. §§ 105-266, 105-266.1, 105-267 and 105-267.1.

2. Venue is proper in Wake County Superior Court pursuant to N.C.G.S. § 105-266, et. seq., and Defendants either

reside or are located in Wake County, North Carolina, and their unlawful acts were committed in Wake County, North Carolina.

3. The 394 named federal retiree Plaintiffs of Class A and the seven named federal military personnel and reservists Plaintiffs of Class B were during all times relevant hereto taxpaying citizens and residents of the State of North Carolina. In addition, the named Class A and B Plaintiffs and proposed Plaintiff class members constitute a class in which the United States Government has a special interest, and as such, constitute a federal instrumentality.

4. Defendant Helen A. Powers ("Powers") is the Secretary of Revenue of the State of North Carolina and is responsible for the administration of North Carolina tax laws regarding the collection and refunding of taxes on individual personal income. Defendant Powers is being sued in both her official and individual capacities.

5. The Defendant, the North Carolina Department of Revenue ("Department of Revenue") is the agency charged with the administration of state tax law and policy, including the levying and refunding of individual personal income taxes.

6. The Defendant, Harlan Boyles, is the Treasurer of the State of North Carolina and, upon information and belief, in that capacity has custody of the tax monies illegally collected from the Plaintiff class members. Defendant Boyles is being sued in his official capacity.

7. Defendant State of North Carolina is a sovereign state, a part of the United States of America and matters herein complained of were and are being committed by virtue of the purported power and authority of said State by officials, agents and employees thereof.

CLASS REPRESENTATION

8. This action is properly maintainable as a class action pursuant to N.C. Gen. Stat. § 1A-1, Rule 23, as described hereafter.

9. The named Plaintiffs bring this action on behalf of themselves and all other individuals similarly situated. The classes that Plaintiffs propose to represent are composed of all individuals who:

CLASS A

a. have been former employees (or beneficiaries, survivors, etc., of former employees) of the federal government, including any branch, department or agency thereof and who were or are entitled to receive federal retirement pension benefits either on account of their own employment relationship with the federal government or that of the person with respect to whom they are a beneficiary, survivor, etc.; and

b. paid or pay income tax to the State of North Carolina on their federal retirement pension benefits, or who will be required to pay such tax on such benefit in the future.

CLASS B

a. in the current tax year and in tax years prior hereto have been employees of the federal government as federal active duty military and reservist personnel (or beneficiaries, survivors, etc.., of such employees) and were and are entitled to receive federal compensation; and

b. have been and are required by Defendants to pay income tax to the State of North Carolina on their federal compensation benefits during such years and who will be required to so pay in the future.

10. The members of the classes that Plaintiffs propose to represent are believed to include more than 100,000 persons and are so numerous that joinder of all members is impracticable. The identity of each individual member of the class can be readily ascertained from the books and records maintained by Defendants or available to them from the federal government and its military and/or other agencies.

11. The questions of law and fact herein are common to all members of the classes that Plaintiffs propose to represent.

12. The claims of the representative named Plaintiffs are typical of the claims of those unnamed members of the classes whom Plaintiffs propose to represent.

13. The common relief sought by named Plaintiffs is effective and appropriate to the entire classes. Adjudication of common questions of law and proof of common questions of fact will be dispositive of the rights of each member of the classes.

14. Named Plaintiffs of Classes A and B will fairly and adequately protect the interests of the members of the class they propose to represent, and their counsel are experienced in the prosecution of class actions and in litigation of constitutional claims.

15. Defendants have acted and refused to act on grounds generally applicable to both Classes A and B by: (1) engaging in a pattern, practice and policy of unlawful and unconstitutional taxing of federal government retirement pension benefits while at the same time exempting from state income tax the retirement benefits of former state and local government

employees of North Carolina and several other states; and (2) engaging in a pattern, practice and policy of unlawful and unconstitutional taxing of federal compensation of active duty military personnel and reservists while exempting from state income tax $1,500 of compensation benefits received by the members of the North Carolina National Guard and Militia.

16. A class action is far superior to any other available method for the fair and efficient adjudication of this controversy in that a class action can be easily managed, will permit the adjudication of numerous individuals' claims in one forum and will conserve the resources of both the parties and of the Court. Many of the proposed class members may not be aware of their rights against the Defendants and many are believed not to be in a financial position to assert such rights. The desirability of concentrating the controversy in a single forum outweighs any interest of individual members of the proposed classes in individually controlling the prosecution of his or her claims.

I. CLAIMS OF FORMER FEDERAL EMPLOYEES (CLASS A) AND FEDERAL ACTIVE DUTY AND MIITARY RESERVE PERSONNEL (CLASS B) UNDER 42 7.S.C. § 1983

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

CLASS A

17. Upon information and belief, there are approximately 100,000 former federal employees in the State of North Carolina who have paid state income taxes on their federal retirement pension benefits over a several-year period, and Defendants should be required to return all such taxes unlawfully collected by them for the tax years 1989, 1988, 1987-1985, and tax years prior thereto.

18. For a number of years preceding the commencement of this action and continuing to the present time, Plaintiffs have filed state income tax returns and were required by Defendants Powers and the Department of Revenue to pay North Carolina income tax on their federal retirement pension benefits.

19. During the years preceding commencement of this action and up to tax year 1989, former state and local government employees were exempted by state law from paying state income taxes on retirement pension benefits.

20. Defendants assert certain provisions of the North Carolina General Statutes, including but not limited to G.S. §§ 105-266, 105-266.1, 105-267 and 105-267.1, in an effort to deny to Plaintiffs and those similarly situated their rights to relief from the effects of the unlawful and discriminatory conduct engaged in by Defendants.

21. Judicial interpretation of G.S. §105-266, 105-266.1, 105-267 and 105-267.1, coupled with a formal opinion of the Attorney General of North Carolina and the policies of the Department of Revenue based thereon, render it impossible for Plaintiffs and those similarly situated to contest the taxing of their federal pension benefits in a "plain, speedy and efficient manner," so that a class action in this Court is the appropriate means for redress of Plaintiffs' grievances.

CLASS B

22. Upon information and belief, there are in excess of approximately 25,000 federal active duty military and reservist personnel in the State of North Carolina who have paid state income taxes on their federal compensation over a several-year period. Defendants should be required to return all such taxes unlawfully collected by them for the tax years 1989, 1988, 1987-1985, and tax years prior thereto.

23. For a number of years preceding the commencement of this action and continuing to the present time, the Plaintiffs have filed state income tax returns and were required by Defendants Powers and the Department of Revenue to pay income tax on their federal compensation to the State of North Carolina.

24. During the years preceding commencement of this action and up to the present time, members of the North Carolina National Guard and militia were and are exempted by state law from paying state income taxes on $1,500 of their active duty pay.

N.C. Gen. Stat. § 127A-3 defines the North Carolina National Guard and Militia as:

> The North Carolina National Guard, both army and air, shall consist of regularly commissioned, warrant and enlisted personnel between such ages as may be established by regulations promulgated by the secretary of the appropriate service and shall be organized, governed, armed, equipped and have such duties and responsibilities as hereinafter provided.

25. Defendants, through their representatives, including the Senior Deputy Secretary to Defendant Powers and Defendants Powers' Director for Individual Income Tax Division have acknowledged that the "Tax Fairness Action of 1989", N.C. Gen. Stat. §§ _____ provides a $1,500 exemption for Members of the North Carolina National Guard and Militia that is not provided to United States military personnel.

26. Upon information and belief, Defendants will assert certain provisions of the North Carolina General Statutes, including but not limited to N.C. Gen. Stat. §§ 105-266 through -267.1, in an effort to deny to Plaintiffs and those similarly situated their rights to relief from the effects of the unlawful and discriminatory conduct engaged in by Defendants.

27. Judicial interpretation of N.C. Gen. Stat. §105-266, 105-266.1, 105-267 and 105-267.1 and the policies of the Department of Revenue, render it impossible for Plaintiffs and those similarly situated to contest the taxing of their federal compensation benefits in a "plain, speedy and efficient manner," so that a class action in this Court is the appropriate means for redress of Plaintiffs' grievances.

28. The North Carolina discriminatory income tax scheme in favor of members of the North Carolina National Guard and Militia has continued since the Davis v. Michigan decision and the adjournment of the 1989 North Carolina Legislature.

FIRST CLAIM FOR RELIEF ON BEHALF OF CLASS A
(42 U.S.C. § 1983, Violation of the
Constitution and Laws of the United States)

29. The allegations of paragraphs 1-27 are incorporated and realleged herein by reference.

30. Under 42 U.S.C. § 1983, the actions of Defendants as set forth above, have exceeded and continue to exceed their lawful authority in that their acts have been and will be unlawful and discriminatory against the Plaintiffs and those similarly situated as retired former federal employees who receive retirement benefits for personal services performed for the United States Government. The policy, pattern and practice by which Defendants have entirely exempted from state income taxation the retirement benefits of former state and local government employees, while only partially exempting from state income taxation the retirement income of federal employees and their spouses, has violated and will continue to violate:

a. The Public Salary Tax Act of 1939, 4 U.S.C. § 111;

b. The doctrine of intergovernmental tax immunity as declared by the United States Supreme Court in Davis v. Michigan Dept. of Treasury, supra;

c. Article VI, Clause 2 of the United States Constitution;

d. The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

The Defendants have at all times relevant hereto acted under color of state law and such actions on the part of the Defendants have caused and will cause a deprivation of the rights, privileges and immunities guaranteed under the laws and Constitution of the United States to the Plaintiffs and those similarly situated.

31. Title 4 of the United States Code, § 111, authorizes states to tax the income of individuals for pay or compensation for personal services if the tax does not discriminate against the individual because of the source of the pay or compensation. By favoring retired state employees over retired federal employees, the actions of the Defendants violate 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. Davis v. Michigan Dept. of Treasury, supra.

32. Since the United States Supreme Court's decision in Davis v. Michigan Dept. of Treasury, on March 28, 1989, Defendants have failed to remedy their discriminatory collection of state income tax on the retirement benefits of federal employees residing in the State of North Carolina.

33. On information and belief, Defendants wrongfully continue to collect and spend state income tax funds collected from federal employee retirement benefits without providing notice that such tax payment is unlawful, unconstitutional and not required.

34. Further, on information and belief, Defendants have not taken adequate steps to notify federal pensioners who have paid state income tax on retirement benefits for 1989, 1988, 1987-1985, and prior tax years, that he or she may be entitled to a refund of such taxes unlawfully collected.

35. The acts or omissions as described above evidence an intentional disregard of the constitutional rights of Plaintiffs, and reflect the intent of Defendants to continue to unlawfully collect state income taxes from Plaintiffs and others similarly situated.

36. Upon information and belief, all taxes heretofore unlawfully collected are being deposited into the Treasury of this State, and disbursed in total disregard of and with intentional deprivation of the constitutional rights of Plaintiffs, and others similarly situated.

37. Defendants should be enjoined and ordered to segregate all such funds illegally collected and place them in an interest-bearing escrow account pending determination of the rights of Plaintiff class.

38. Defendants should be further enjoined from appropriating and spending such taxes and ordered to immediately notify all federal retirees, or their beneficiaries, who have paid and are paying tax on retirement benefits, of their rights with respect to such tax paid.

SECOND CLAIM FOR RELIEF ON BEHALF OF CLASS A
(State Constitutional Claims)

39. The allegations of paragraphs 1-37 are incorporated and realleged herein by reference.

40. As a result of Defendants' actions, as set forth above, Plaintiffs have been deprived of their rights of due process

and equal protection of the laws guaranteed to them under Article 1, Section 19 of the Constitution of North Carolina.

41. As a further result of Defendants' actions, as set forth above, Plaintiffs have been deprived of their constitutional right to uniformity in taxation guaranteed all persons under Article V, Section 2 of the Constitution of North Carolina.

42. As a further result of Defendants' actions, as set forth above, Plaintiffs have been deprived of thier constitutional right against the taxing of acts previously done guaranteed all persons under Article I, Section 16 of the Constitution of North Carolina.

THIRD CLAIM FOR RELIEF ON BEHALF OF CLASS A
(Common Law Claim for Unjust
Enrichment and Establishment of Constructive Trust)

43. The allegations of paragraphs 1-40 are incorporated and realleged herein by reference.

44. Based on Defendants' past and continuing unlawful collection of income taxes on retirement benefits received or to be received by Plaintiffs, and those similarly situated, as alleged in the preceding paragraphs, and based on Defendants' refusal to pay proper compensation for such unlawful income tax collection and monies withheld, Defendants are equitably, quasi-contractually obligated and should be required to make restitution to Plaintiffs and those similarly situated for all sums unlawfully paid to, deposited with or collected by Defendants, plus legal and prejudgment interest thereon from the dates said sums were paid, deposited or collected until paid to Plaintiffs and those similarly situated. To allow Defendants to accept or retain the benefits received or to be received as a result of the unlawful tax collection, as previously alleged herein, would unjustly enrich the State at the expense of Plaintiffs and would be inequitable.

45. As a result of Defendants' actions as alleged above and to prevent further unjust enrichment, Plaintiffs and those similarly situated are entitled to have all such funds unlawfully paid to, deposited with or collected by Defendants, plus legal and prejudgment interest thereon from the dates said funds were paid, deposited or collected and segregated and maintained in constructive trust for the use and benefit of Plaintiffs and those similarly situated as their interests may appear.

FOURTH CLAIM FOR RELIEF ON BEHALF OF CLASS B
(42 U.S.C. § 1983, Violation of the
Constitution and Laws of the United States)

46. The allegations of paragraphs 1-43 are incorporated and realleged herein by reference.

47. Under 42 U.S.C. § 1983, the actions of Defendants as set forth above, have exceeded and continue to exceed their lawful authority in that their acts have been and will be unlawful and discriminatory against Plaintiffs and those similarly situated as federal active duty military and reservist personnel who receive compensation for services performed for the United States Government. The policy, pattern and practice by which the Defendants partially exempt from state income taxation the compensation benefits of members of the North Carolina National Guard and Militia, while failing to similarly exempt from state income taxation the income of federal active duty military and reservist personnel, has violated and will continue to violate:

a. The Public Salary Tax Act of 1939, 4 U.S.C. § 111;

b. The doctrine of intergovernmental tax immunity as declared by the United States Supreme Court in Davis v. Michigan Dept. of Treasury supra;

c. Article VI, Clause 2 of the United States Constitution;

d. The due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution.

Defendants have at all times relevant acted under color of state law and such actions on the part of Defendants have caused and will cause a deprivation of the rights, privileges and immunities guaranteed under the laws and Constitution of the United States to Plaintiffs and those similarly situated.

48. Title 4 of the United States Code, § 111, authorizes states to tax the income of individuals for pay or compensation for personal services if the tax does not discriminate against the individual because of the source of the pay or compensation. By favoring members of the North Carolina National Guard and Militia over federal active military and reservist personnel, the actions of Defendants violate 4 U.S.C. § 111 and the doctrine of intergovernmental tax immunity. Davis v. Michigan Dept. of Treasury, supra.

49. Since the United States Supreme Court decision in Davis v. Michigan Dept. of Treasury, Defendants have failed, on information and belief, to change their discriminatory collection of state income tax on the compensation of federal active duty military and federal reservist personnel residing in the State of North Carolina.

50. On information and belief, after the passage of the Tax Fairness Action of 1989 and with knowledge of Davis v. Michigan Dept. of Treasury, Defendants continue to unlawfully discriminate against federal active duty military and reservist personnel by unlawfully partially exempting members of the North Carolina National Guard and Militia from state income taxation.

51. The acts or omissions as described above evidence an intentional disregard of the constitutional rights of Plaintiffs, and reflect the intent of Defendants to continue to unlawfully collect state income taxes from Plaintiffs and others similarly situated.

52. Upon information and belief, all taxes heretofore unlawfully collected are being deposited into the Treasury of this State, and disbursed in total disregard of and with intentional deprivation of the constitutional rights of Plaintiffs, and others similarly situated.

53. Defendants should be enjoined and ordered to segregate all such funds illegally collected and place them in an interest-bearing escrow account pending determination of the rights of Plaintiff class.

54. Defendants should be further enjoined from appropriating and expending such taxes and ordered to immediately notify all federal active duty military and reservist personnel, or their beneficiaries, who have paid and are paying taxes on compensation benefits, of their rights with respect to such taxes paid.

FIFTH CLAIM FOR RELIEF ON BEHALF OF CLASS B
(State Constitutional Claims)

55. The allegations of paragraphs 1-52 are incorporated and realleged herein by reference.

56. As a result of Defendants' actions, as set forth above, Plaintiffs have been deprived of their rights of due process and equal protection of the laws guaranteed to them under Article 1, Section 19 of the Constitution of North Carolina.

57. As a further result of Defendants' actions, as set forth above, Plaintiffs have been deprived of their constitutional

right to uniformity in taxation guaranteed all persons under Article V, Section 2 of the Constitution of North Carolina.

58. As a further result of Defendants' actions, as set forth above, Plaintiffs have been deprived of their constitutional right against the taxing of acts previously done guaranteed to all persons under Article I, Section 16 of the Constitution of North Carolina.

SIXTH CLAIM FOR RELIEF ON BEHALF OF CLASS B
(State Common Law Claim for Unjust Enrichment and Establishment of Constructive Trust)

59. The allegations of paragraphs 1-55 are incorporated and realleged herein by reference.

60. Based on Defendants' past and continuing unlawful collection of income taxes on compensation benefits received or to be received by Plaintiffs, and those similarly situated, from the United States Government as alleged in the preceding paragraphs, and based on Defendants' refusal to pay proper compensation for such unlawful income tax collection and monies withheld, Defendants are equitably, quasi-contractually obligated and should be required to make restitution to Plaintiffs and those similarly situated for all sums unlawfully paid to, deposited with or collected by Defendants, plus legal and prejudgment interest thereon from the dates said sums were paid, deposited or collected until paid to Plaintiffs and the class members. To allow Defendants to accept or retain the benefits received or to be received as a result of the unlawful tax collection, as previously alleged herein, would unjustly enrich the State at the expense of Plaintiffs and would be inequitable.

61. As a result of Defendants' actions as alleged above and to prevent further unjust enrichment, Plaintiffs and those similarly situated are entitled to have all such funds unlawfully paid to, deposited with or collected by Defendants, plus legal and

prejudgment interest thereon from the dates said funds were paid, deposited or collected and segregated and maintained in constructive trust for the use and benefit of Plaintiffs and those similarly situated as their interests may appear.

II. CLAIMS OF FORMER FEDERAL EMPLOYEES (CLASS A PLAINTIFFS) FOR TAX REFUNDS

62. The allegations of paragraphs 1-58 are incorporated and realledged herein by reference.

63. This action is brought to recover North Carolina income taxes paid by Plaintiffs and the court has jurisdiction to determine this matter de novo under N.C.G.S. §§ 105-266, 105-266.1, 105-267, and 105-267.1, and any other statute in Chap. 105, whether specifcally alleged herein or not, and all conditions precedent to such jurisdiction and to the power and duty of this Court to order the refund of such taxes have been performed.

64. Defendant Powers is the Secretary of Revenue of the State of North Carolina and is the proper named Defendant in action of this kind to recover taxes paid to the Department of Revenue of the State of North Carolina. References herein to the Department of Revenue shall be deemed also to refer to Defendant Powers.

65. Plaintiffs and all similarly situated federal pensioners have been required to pay taxes to Defendant upon federal retirement pensions in violation of, among other things, 4 U.S.C. § 111 and the federal constitutional principle of intergovernmental immunity.

66. Plaintiffs instituted a class action lawsuit in the Eastern District of North Carolina on April 14, 1989, challenging Defendants' taxation of their federal retirement income while

exempting from the same tax liability retirement benefits of former state and local government employees.

67. On April 14, 1989, U.S. District Court Judge F. T. Dupree, Jr. entered an Order in Swanson v. Powers, et al., No. 89-282-CIV-5-H, certifying that action of former federal employees as a proper class for the express "sole purpose of giving any notice to the North Carolina Department of Revenue that may be required to obtain income tax refunds and required by G.S. § 105 of the North Carolina General Statutes."

68. On April 14, 1989, the same day Judge Dupree entered the Order referred to above, Plaintiffs' counsel hand-delivered to Secretary Powers and the Department of Revenue a "Notice of Refund Demand on Behalf of Federal Pensioners In North Carolina," in which counsel, on behalf of the class of federal retirees and pursuant to N.C.G.S. §§ 105-266, 105-266.1, 105-267, 105-267.1, and any other legal means, protested and demanded the "refund of all taxes paid to date and to be paid hereafter by the named and unnamed members of this class due to inclusion of federal retirement pay in their taxable incomes . . . ." Counsel further stated that they were unable to provide specific names, addresses, social security numbers and amounts for unnamed members of the class of federal pensioners because such information was not available at that time, but that such information would be available to the Department of Revenue as it is specifically reflected on the returns of all federal retirees and survivors receiving pension benefits.

69. Again, on April 18, 1989, counsel for Plaintiffs delivered to Secretary Powers and the Department of Revenue a "Second Notice of Refund Demand on Behalf of Federal Pensioners In North Carolina," protesting the taxation of federal retirement pay and demanding a refund of all taxes paid.

70. In their Answer, filed June 24, 1989, to Plaintiffs' original Complaint, the Defendants admitted that for taxable years

1988 and tax year prior thereto a greater individual income tax exemption was allowed for state and local retirement income than for federal retirement income and that this practice had been determined to be unconstitutional and unlawful by the United States Supreme Court.

71. On July 11, 1989, Defendant Powers responded in writing to the class demands for refunds previously made by Plaintiffs' counsel. The defendant declined to hold a hearing as required by G.S. § 105-266.1. Instead, the defendant determined that the demands for the refunds would be controlled by N.C.G.S. § 105-267, which provides in pertinent part, that "[a]t any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded." The statute does not set forth any particular guidelines or requirements for what information must be included in such a demand. Defendant, however, responded in her July 11, 1989 letter that a demand must include "the taxpayer's name and social security number, the year for which the tax was paid, the date on which the return was filed or the tax was paid, and the amount of federal retirement income received by the taxpayer during the year."

72. In the current and prior tax years, particularly tax years 1988, 1987, 1986, and 1985, taxpayers were advised by the Department of Revenue through the basic annual "HOW TO FILE YOUR TAX RETURN AND PAY YOUR TAX" instruction booklets that "you may amend your tax return by filing an amended return as provided on the form. To receive a refund, your amended tax return must be filed within three years from the date the original return was due or within 6 months of the date the tax was paid, whichever is later. The statute of limitations does not allow refunds on late filed or amended tax returns received more than three years after the due date of the return." (Emphasis added.) The Department of Revenue also publishes "North

Carolina Individual Income Tax Bulletins" for the purpose of presenting the administrative interpretation and application of North Carolina income tax laws relating to individual taxpayers. In all the tax years related to this action, neither of the foregoing publications makes reference to or mention of the 30-day limitations period set forth in § 105-267 within which to demand a refund. The only limitation period regarding refunds that is suggested to individual taxpayers is the three-year limitations period described above.

73. Since early April of 1989, and through February 19, 1990, at least 9,627 taxpayers who filed 1988 refund requests with respect to tax paid on federal retirement income were denied refunds by the Defendant on grounds their requests were not timely filed.

74. These demands for refunds reflect approximately eight million dollars in tax monies paid by federal pensioners under a patently unconstitutional taxing scheme.

75. Further, as of February 19, 1990, the Department refunded $9,145,523.92 to at least 12,404 taxpayers who filed requests which the defendant deemed to be timely for refund of 1988 taxes paid on federal retirement income.

76. For the purpose of filing a protective claim for refund, taxes are paid when the taxpayer's return is due to be filed, which is April 15 of the year following the tax year in question. It is not until this date that the Defendant can determine that a tax is due, but unpaid, and then seek to assess a deficiency.

77. The April 14, 1989 Order of Judge Dupree certifying the action of federal pensioners in North Carolina as a class action for the "sole purpose of giving any notice . . . that may be required to obtain tax refunds . . .", together with the written class demands for refunds of April 14 and April 18, 1989, constituted a timely and sufficient demand for refunds under

Chapter 105 of the North Carolina General Statutes and tolled any limitations period for all federal pensioners who were entitled to a refund of taxes paid on pension benefits.

78. Consequently, Defendants' denials of refund demands on the ground of being untimely under G.S. § 105-267 were wrongful and Plaintiffs are entitled to recover of Defendant such income taxes paid upon their federal retirement benefits for tax years 1985, 1986, 1987, and 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray as follows:

1. That this Court, pursuant to N.C. Gen. Stat. § 1A-1, Rule 23, certify Plaintiffs Classes A and B unconditionally and order Defendants to reimburse Plaintiff class members for all monies paid and received as a result of Defendants' unlawful acts, including but not limited to all monies which Defendants have unlawfully collected and received from them, plus interest.

2. That, pursuant to N.C. Gen. Stat. § 1-253 et seq, the failure of the Defendants to exempt from state income taxation the federal retirement benefits received by Class A Plaintiffs in the same manner as the exemption for retired state and local government workers be declared unlawful and unconstitutional;

3. That, pursuant to N.C. Gen. Stat. § 1-253 et seq, the failure of the Defendants to exempt from state income taxation the federal compensation benefits received by Class B Plaintiffs in the same manner as the exemption for members of the North Carolina National Guard and Militia be declared unlawful and unconstitutional;

4. That the Court order Defendants to identify, segregate and place in an interest-bearing escrow account all unexpended illegally collected taxes to be held in trust for the use and benefit of Class A and B Plaintiffs and those similarly situated pending resolution of this case;

5. That the Court order Defendants to notify all Plaintiff Class A members that the failure of Defendants to exempt from state income taxation the federal retirement benefits received by Plaintiffs and those similarly situated in the same manner as the exemption for retired state and local government employees during 1988, 1987-1985, and prior years, is unlawful and unconstitutional, and that Plaintiffs and those similarly situated are, accordingly, not required to pay taxes on their federal retirement benefits; that the Court further enjoin Defendants from continuing to collect state income taxes on Plaintiffs' federal retirement pension benefits under the existing illegal tax scheme; and that the Court enjoin the disbursement of such illegally collected funds now in Defendants' possession, custody or control;

6. That the Court order Defendants to notify all Plaintiff Class B members that the failure of Defendants to exempt from state income taxation the federal compensation benefits received by Plaintiffs and those similarly situated in the same manner as the exemption for members of the North Carolina National Guard and Militia during 1990-1085, and prior years, is unlawful and unconstitutional, and that Plaintiffs and those similarly situated are, accordingly, not required to pay taxes on their federal compensation benefits; that the Court further enjoin Defendants from continuing to collect state income taxes on Plaintiffs' federal compensation benefits under the existing illegal tax scheme; and that the Court enjoin the disbursement of such illegally collected funds now in Defendants' possession, custody or control;

7. That reasonable attorneys' fees be awarded to the Plaintiffs and that the costs of this action be assessed against the Defendants; and

8. For all other relief as to the court shall deem reasonable and appropriate.

This the 16th day of March, 1990.

WOMBLE CARLYLE SANDRIDGE & RICE

/s/ G. Eugene Boyce
G. EUGENE BOYCE

/s/ Donald L. Smith
DONALD L. SMITH

/s/ Wallace R. Young, Jr.
WALLACE R. YOUNG, JR.

Post Office Box 831
Raleigh, North Carolina 27602
(919) 755-2100

Charles H. Taylor
Attorney at Law

/s/ Charles H. Taylor
CHARLES H. TAYLOR

4295 Shattlon Drive
Winston-Salem, North Carolina 27106
(919) 924-6064

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **COMPLAINT** in the above-captioned action upon all parties by depositing a copy of same in the United States Mail, first-class postage prepaid, addressed as follows:

Marilyn R. Mudge
Assistant Attorney General
Room 372, Revenue Building
P.O. Box 629
Raleigh, NC 27602-0629

Douglas A. Johnston
Assistant Attorney General
P.O. Box 629
Raleigh, NC 27602-0629

Lacy H. Thornburg
Defendants Process Agent for the
State of North Carolina
2 East Morgan St.
Raleigh, NC 27602

This the 16th day of March, 1990.

/s/ Wallace R. Young, Jr.
G. Eugene Boyce
Donald L. Smith
Wallace R. Young, Jr.
Attorney for Plaintiffs

APPENDIX FF

NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
WAKE COUNTY — 90 CVS 3127

NORMAN W. SWANSON, et al,

Class A Plaintiffs,

CHARLES L. BERRY, ROBERT D. LENNON, ZEBULON V. MOSELEY, III, GARY W. O'NEAL, MILTON S. PRICE, MARTIN L. SPEICHER and PAUL H. TURNEY.

Class B Plaintiffs,

v.

THE STATE OF NORTH CAROLINA, HELEN A. POWERS, Individually as Secretary of the North Carolina Department of Revenue, THE NORTH CAROLINA DEPARTMENT OF REVENUE and HARLAN BOYLES, Treasurer of The State OF North Carolina,

Defendants.

ANSWER

[Filed: April 18, 1990]

COMES the Attorney General of the State of North Carolina on behalf of the State of North Carolina; Helen A. Powers, individually and in her capacity as Secretary of Revenue of the State of North Carolina; the North Carolina Department of Revenue; and Harlan E. Boyles, State Treasurer; defendants herein, and, answering plaintiffs' complaint, alleges and says:

FIRST DEFENSE

1. It is admitted that this Court has original Jurisdiction to adjudicate State constitutional issues and claims arising under 42 U.S.C. §1983. It is denied that plaintiffs' complaint states a claim for relief under 42 U.S.C. §1983. The remaining allegations of paragraph 1 are denied. It is expressly denied that this Court has Jurisdiction to adjudicate claims for declaratory and injunctive relief in this action pursuant to Article 26, Chapter 1, of the General Statutes of North Carolina. It is further expressly denied that this Court has Jurisdiction to adjudicate claims for refunds of taxes in this action pursuant to N.C.G.S. §§105-266, 105-266.1, 105-267, and 105-267.1;

2. It is admitted that defendants reside or are located in Wake County. Except as admitted herein, Paragraph 2 is denied, and it is expressly denied that defendants committed unlawful acts;

3. Upon information and belief, it is admitted that the named plaintiffs were at all relevant times taxpaying citizens and residents of the State of North Carolina. The remaining allegations contained in Paragraph 3 are denied. In particular it is expressly denied that the named plaintiffs and the proposed class members constitute a class in which the United States government has a special interest. It is further expressly denied that the named plaintiffs and the proposed class constitute a federal instrumentality;

4. Paragraph 4 is admitted;

5. The defendant North Carolina Department of Revenue is the agency charged with the administration of state tax law, including the laws related to the levy and refund of individual income taxes. Except as admitted herein, Paragraph 5 is denied;

6. It is admitted that defendant Harlan Boyles is the Treasurer of the State of North Carolina and that he is being sued in his official capacity. Except as admitted herein, Paragraph 6 is denied, and defendant Boyles expressly denies that he has custody of any tax monies which were illegally collected;

7. It is admitted that defendant State of North Carolina is a sovereign state of the United States of America. Except as admitted herein, Paragraph 7 is denied;

8. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in Paragraph 8 and, therefore, deny them;

9. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in Paragraph 9 and, therefore, deny them;

10. It is admitted that plaintiffs believe that the proposed class includes approximately 100,000 persons. It is expressly denied that the identity of each individual member of the class can be readily ascertained from the books and records maintained by the defendants or available to them from the federal government and its military and/or other agencies. The remaining allegations contained in Paragraph 10 are denied for lack of sufficient information to form a belief as to their truth or falsity;

11. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in Paragraph 11 and, therefore, deny them;

12. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in Paragraph 12 and, therefore, deny them;

13. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in Paragraph 13 and, therefore, deny them;

14. Defendants lack sufficient knowledge and information to form a belief as to the truth or falsity of the allegations contained in Paragraph 14 and, therefore, deny them;

15. Paragraph 15 is denied;

16. Paragraph 16 is denied;

17. Defendants lack sufficient information to form a belief as to the truth or falsity of the allegation that there are approximately 100,000 former federal employees in the State of North Carolina who have paid state income taxes on their federal retirement pension benefits and, therefore, deny same. The remaining allegations in paragraph 17 are denied, and it is expressly denied that defendants have collected taxes unlawfully;

18. It is admitted that for taxable years 1988 and earlier, the General Statutes of North Carolina afforded only a partial income tax exemption for retirement benefits paid to former federal employees. It is further admitted that Chapter 728 of the 1989 Session Laws, codified as N.C.G.S. 105-133 et. seq., requires that all governmental retirement benefits in excess of $4000.00 be included in taxable income for taxable years 1989 and later. Except as admitted herein, paragraph 18 is denied;

19. It is admitted that for taxable years 1988 and earlier, the General Statutes of North Carolina afforded a total income tax exemption for retirement benefits paid to former state and local government employees. Chapter 728 of the 1989 Session Laws, codified as N.C.G.S. 105-133 et. seq., requires that all governmental retirement benefits in excess of $4000.00 be included in taxable income for taxable years 1989 and later. Except as admitted herein, paragraph 19 is denied;

20. It is admitted that defendants believe that plaintiffs' state income tax liability is governed by the North Carolina General Statutes, including the provisions cited in Paragraph 20 of plaintiffs' complaint. Except as admitted herein, Paragraph 20 is denied, and it is expressly denied that defendants have engaged in unlawful and discriminatory conduct or that they have made any effort to deny any rights of plaintiffs;

21. Paragraph 21 is denied;

22. Defendants lack sufficient information to form a belief as to the truth or falsity of the allegation that there are approximately 25,000 federal active duty military and reservist personnel in the State of North Carolina who have paid state income taxes on their federal compensation and, therefore, deny same. The remaining allegations in Paragraph 22 are denied, and it is expressly denied that defendants have collected taxes unlawfully;

23. It is admitted that for taxable years 1988 and earlier G.S. 105-141(a) defined gross income for individual income tax purposes to include "compensation for services." It is further admitted that for taxable years beginning with 1989 G.S. 105-134.1 defined gross income by adopting the definition set out in Section 61 of the Internal Revenue Code as enacted as of January 1, 1989. Except as admitted herein, Paragraph 23 is denied;

24. It is admitted that for taxable years 1988 and earlier G.S. 105-141(b)(25) excluded from gross income "[a]ny amount, not exceeding one thousand five hundred dollars ($1,500), paid to an individual as compensation for the performance of duties as a member of the North Carolina organized militia." It is further admitted that for taxable years beginning with 1989 G.S. 105-134.6(b)(4) directs that a deduction "shall be made in calculating North Carolina taxable income" for "[a]ny amount not to exceed one thousand five hundred dollars ($1,500) received by the taxpayer during the taxable year as compensation for the performance of duties as a member of the North Carolina organized militia." Except as admitted herein, paragraph 24 is denied;

24A. With respect to the allegations contained in the unnumbered paragraph following paragraph 23, it is admitted that the quoted language appears in G.S. 127A-3. Except as admitted herein, the allegations are denied:

25. It is admitted that the Tax Fairness Act of 1989 included a provision which was codified as G.S. 105-134.6(b)(4). It is further admitted that for taxable years beginning with 1989 G.S. 105-134.6(b)(4) directs that a deduction "shall be made in calculating North Carolina taxable income" for "[a]ny count not to exceed one thousand five hundred dollars ($1,500) received by the taxpayer during the taxable year as compensation for the performance of duties as a member of the North Carolina organized militia." Except as admitted herein, paragraph 25 is denied;

26. It is admitted that defendants believe that plaintiffs' state income tax liability is governed by the North Carolina General Statutes, including the provisions cited in Paragraph 26 of plaintiffs' complaint. Except as admitted herein, Paragraph 26 is denied, and it is expressly

denied that defendants have engaged in unlawful and discriminatory conduct or that they have made any effort to deny any rights of plaintiffs;

27. Paragraph 27 is denied;

28. It is admitted that for taxable years 1988 and earlier G.S. 105-141(b)(25) excluded from gross income "[a]ny amount, not exceeding one thousand five hundred dollars ($1,500), paid to an individual as compensation for the performance of duties as a member of the North Carolina organized militia." It is further admitted that for taxable years beginning with 1989 G.S. 105-134.6(b)(4) directs that a deduction "shall be made in calculating North Carolina taxable income" for "[a]ny amount not to exceed one thousand five hundred dollars ($1,500) received by the taxpayer during the taxable year as compensation for the performance of duties as a member of the North Carolina organized militia." Except as admitted herein, Paragraph 28 is denied;

29. Paragraphs 1 through 28, above, are incorporated herein by reference;

30. It is admitted that at all times relevant hereto, defendants acted under color of state law. Except as admitted herein, Paragraph 30 is denied;

31. The allegations of Paragraph 31 with respect to the provisions of 4 U.S.C. §111 are denied for the reason that the statute speaks for itself. It is admitted that for taxable years 1988 and earlier, the General Statutes of North Carolina allowed a greater individual income tax exemption for state and local retirement income than for federal retirement income and that a similar statute in the State of Michigan was held to violate principles of intergovernmental tax immunity in Davis v. Michigan Department of Treasury, --U.S.--, 109 S.Ct. 1500, 103 L.Ed.2d 891, decided March 28, 1989. Except as admitted herein, Paragraph 31 is denied;

32. Paragraph 32 is denied;

33. Paragraph 33 is denied. In particular it is denied that defendants were under any duty to give any notice to any person

concerning the taxation of federal retirement benefits or the expenditure of state tax collections;

34. Paragraph 34 is denied. In particular it is denied that defendants were under any duty to give any notice to any person concerning the refund of tax paid on federal retirement benefits;

35. Paragraph 35 is denied;

36. It is admitted that tax collections are deposited into the State treasury. Except as expressly admitted herein, Paragraph 36 is denied;

37. Paragraph 37 is denied,

38. Paragraph 38 is denied;

39. Paragraphs 1 through 38, above, are incorporated herein by reference,

40. Paragraph 40 is denied;

41. Paragraph 41 is denied;

42. Paragraph 42 is denied;

43. Paragraphs 1 through 42, above, are incorporated herein by reference;

44. Paragraph 44 is denied;

45. Paragraph 45 is denied;

46. Paragraphs 1 through 45 are incorporated herein by reference;

47. It is admitted that at all times relevant hereto, defendants acted under color of state law. Except as admitted herein, Paragraph 47 is denied;

48. Paragraph 48 is denied;

49. Paragraph 49 is denied;

50. Paragraph 50 is denied;

51. Paragraph 51 is denied;

52. Paragraph 52 is denied;

53. Paragraph 53 is denied;

54. Paragraph 54 is denied;

55. Paragraphs 1 through 54 are incorporated herein by reference;

56. Paragraph 56 is denied;

57. Paragraph 57 is denied;

58. Paragraph 58 is denied;

59. Paragraphs 1 through 58 are incorporated herein by reference;

60. Paragraph 60 is denied;

61. Paragraph 61 is denied;

62. Paragraphs 1 through 61 are incorporated herein by reference;

63. It is admitted that this is an action to recover North Carolina income taxes paid by plaintiffs. Except as admitted herein, Paragraph 63 is denied, and it is expressly denied that plaintiffs have satisfied all conditions precedent to the exercise of Jurisdiction by this Court pursuant to N.C.G.S. §§105-266, 105-266.1, 105-267, 105-267.1, or any other provision of Chapter 105 of the General Statutes;

64. It is admitted that defendant Powers is the Secretary of Revenue of the State of North Carolina. Except as admitted herein, Paragraph 64 is denied;

65. It is admitted that for taxable years 1988 and earlier, the General Statutes of North Carolina afforded only a partial income tax exemption for retirement benefits paid to former federal employees. It is further admitted that Chapter 728 of the 1989 Session Laws, codified as N.C.G.S. 105-133 et. seq., requires that all governmental retirement benefits in excess of $4000.00 be included in taxable income for taxable years 1989 and later. Except as admitted herein, Paragraph 65 is denied;

66. Paragraph 66 is admitted;

67. It is admitted that on April 14, 1989, U.S. District Court Judge F. T. Dupree entered an ex parte order which included the quoted language appearing in Paragraph 67 of the complaint. Except as admitted herein, Paragraph 67 is denied, and it is expressly denied that either the order or any notice given to defendants pursuant to such order complies with the requirements of Chapter 105 of the North Carolina General Statutes relating to the refund of individual income tax;

68. It is admitted that on April 14, 1989, plaintiffs' counsel delivered to defendant Powers a letter captioned "Notice of Refund Demand on Behalf of Federal Pensioners In North Carolina," which letter purported to constitute a demand for refund of tax paid by plaintiffs with respect to federal retirement income. It is further admitted that plaintiffs' counsel did not furnish to defendants the names of individual plaintiffs or other identifying information related to the taxation of their federal retirement income. Except as admitted herein, Paragraph 68 is denied, and it is expressly denied that plaintiffs' letter constituted a valid demand for refund within the meaning of Chapter 105 of the General Statutes and that identifying information was available to defendants;

69. It is admitted that on April 18, 1989, plaintiffs delivered a letter captioned "Second Notice of Refund Demand on Behalf of Federal Pensioners In North Carolina." Except as admitted herein, Paragraph 69 is denied, and it is expressly denied that such letter constituted a valid demand for refund within the meaning of Chapter 105 of the General Statutes;

70. Paragraph 70 is admitted;

71. It is admitted that on July 11, 1989, defendant Powers responded in writing to plaintiffs' letters purporting to be class demands for refund. The remaining allegations of Paragraph 71 are denied for the reason that defendant Powers' letter, a copy of which is attached hereto as Exhibit A, speaks for itself;

72. It is admitted that for taxable years 1985 through 1988 the Department of Revenue's annual individual income tax instruction booklets included the quoted language appearing in Paragraph 72 of the complaint. It is further admitted that the Department publishes Individual Income Tax Bulletins reflecting administrative interpretation of the state income tax statutes. In addition it is admitted that the bulletins do not make reference to the thirty-day limitations period set forth in G.S. 105-267. Except as admitted herein, Paragraph 72 is denied. It is expressly denied that the booklets or bulletins "advised" taxpayers or "suggested to individual taxpayers" that the only limitations period applicable to refund requests was three years. It is further expressly denied that general publications such as the booklets and bulletins may be relied upon as governing the availability of refunds to a federal retiree or any other particular individual taxpayer.

73. Paragraph 73 is admitted;

74. It is admitted that as of February 19, 1990, defendants had, pursuant to the thirty-day limitations period provided for in G.S. 105-267, denied a total of approximately eight million dollars in requests for refund of 1988 tax paid with respect to federal retirement income. Except as admitted herein, Paragraph 74 is denied, and it is expressly denied that the tax for which refund was denied was paid pursuant to a taxing scheme known at the time of payment to be unconstitutional;

75. It is admitted that as of February 19, 1990, defendants had refunded $9,145,523.92 to 12,404 taxpayers whose refund requests were filed within thirty days after payment of the tax and were, therefore, timely under G.S. 105-267. Except as admitted herein, Paragraph 75 is denied;

76. Paragraph 76 is denied;

77. Paragraph 77 is denied; and

78. Paragraph 78 is denied.

SECOND DEFENSE

Plaintiffs' complaint should be dismissed pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for the reason that this Court lacks jurisdiction over the subject matter of this action.

THIRD DEFENSE

Plaintiffs' complaint fails to state a claim upon which relief may be granted and should, therefore, be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

FOURTH DEFENSE

The claim against the North Carolina Department of Revenue and the claims against defendants Powers and Boyles in their official capacities as Secretary of Revenue and State Treasurer, respectively, are claims against the State of North Carolina and are absolutely barred by the doctrine of sovereign immunity, and plaintiffs are entitled to no relief, including declaratory relief, injunctive relief, or damages.

FIFTH DEFENSE

To the extent that plaintiffs seek relief from defendant Powers in her individual capacity, their claims are barred by the doctrine of qualified immunity. Any and all actions complained of by plaintiffs were taken by defendant Powers within the scope of her authority as an officer of the State of North Carolina in the good faith belief that she was acting lawfully, properly, and in the best interests of the State. Further, the actions complained of did not violate the clearly established statutory or constitutional rights of any person and were not taken corruptly or maliciously.

SIXTH DEFENSE

Plaintiffs' complaint raises no justiciable case or controversy for the reason that the claims asserted on behalf of the Class A plaintiffs are moot. From and after the decision of the United States Supreme Court in Davis v. Michigan Department of Treasury, supra, on March, 28, 1989, defendants have administered the provisions of the General Statutes relating to taxation of retirement benefits in conformity with that opinion and have complied with requests for refunds of tax paid on federal retirement benefits, provided such requests were timely under G.S. 105-267. Further, the North Carolina General Assembly has enacted Chapter 728 of the 1989 Session Laws, which for taxable years 1989 and later provides for identical state income tax treatment of federal, state, and local government retirement income.

SEVENTH DEFENSE

To the extent plaintiffs seek recovery of taxes paid on a date more than thirty days prior to the date on which demand for refund of such taxes was made upon the Secretary of Revenue, their claims are barred by the statute of limitations set forth in G.S. 105-267.

EIGHTH DEFENSE

To the extent plaintiffs seek recovery of taxes paid for an indefinite period of years preceding the commencement of this action, their claims are barred by the doctrine of laches.

NINTH DEFENSE

Retrospective relief is inappropriate for the reason that the acts complained of were performed in conformity with law as it then existed and the funds sought to be recovered were expended in the performance of governmental functions for the benefit of the citizens of this State, including plaintiffs.

WHEREFORE, the defendants pray the Court that the relief sought in plaintiffs' complaint be denied, that this action be dismissed, that defendants recover their costs and attorney's fees, and that they have such other and further relief as may be just and proper.

This 16th day of April, 1990.

LACY H. THORNBURG
Attorney General

/s/ Marilyn R. Mudge
MARILYN R. MUDGE
Assistant Attorney General
Attorneys for Defendants
Helen A. Powers and North
Carolina Department of Revenue
Room 372, Revenue Building
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone (919) 733-3252

/s/ Douglas A. Johnston/mrm
DOUGLAS A. JOHNSTON
Assistant Attorney General
Attorneys for Defendant
Harlan E. Boyles
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone (919) 733-4052

VERIFICATION

HELEN A. POWERS, being first duly sworn, deposes and says that she is Secretary of Revenue of the State of North Carolina and has authority to make this verification; that she has read the foregoing Answer and knows the contents thereof and that the same is true of her own knowledge except as to those matters and things therein alleged upon information and belief and as to those matters and things, she believes it to be true.

/s/ Helen A. Powers
HELEN A. POWERS
Secretary of Revenue
State of North Carolina

SWORN TO AND SUBSCRIBED before me this 16th day of April, 1990.

/s/ Betty P. Ward
Notary Public

My Commission Expires: 12-21-93

APPENDIX GG

North Carolina General Statute § **105-267** provides:

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of N.C. Gen. Stat. § 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10; 1977, c. 946, s. 1.)

North Carolina General Statute § **105-266.1** provides:

> (a) Any taxpayer may apply to the Secretary of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for the filing of the return or application for a

license or within six months from the date of payment of such tax or additional tax, whichever is later. The Secretary shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The Secretary shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due; except that there shall be no refund to the taxpayer of any sum set off under the provisions of Chapter 105A, the Setoff Debt Collection Act.

* * *

(e) Nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2, and, with respect to tax paid to the Secretary of Revenue, the rights granted by this section are in addition to the rights provided by G.S. 105-267. (1957, c. 1340, s. 10; 1969, c. 44, s. 66; c. 1132, s. 2; 1973, c. 476, s. 193; 1979, c. 801, s. 91; 1981 (Reg. Sess., 1982), c. 1211, s. 2; 1987, c. 827, s. 22.)

(3)

Supreme Court, U.S.
FILED
JUN 23 1994
OFFICE OF THE CLERK

No. 93-1882

In the

Supreme Court of the United States

October Term, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondent.

Petition for A Writ of Certiorari To The Supreme Court of North Carolina

---

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr., Senior Deputy Attorney General
Thomas F. Moffitt*, Special Deputy Attorney General
Norma S. Harrell, Special Deputy Attorney General
Marilyn R. Mudge, Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919)733-3786

**Counsel of Record*

37 pp

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No. 93-1882

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

V.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for A Writ of Certiorari to the Supreme Court of North Carolina

---

BRIEF IN OPPOSITION

INTRODUCTION

Petitioners' Statement of the Case is biased and argumentative and wrongly characterizes the actions taken by North Carolina public officials in response to this Court's decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), as a concerted effort

to deprive them of tax refunds. Petitioners also inappropriately included in their appendix materials[1] that were not before the North Carolina Supreme Court when it decided *Swanson v. North Carolina (III)*, 335 N.C. 674, 441 S.E.2d 537 (1994), the decision precipitating this petition. To correct the resulting unfairness, North Carolina is compelled, pursuant to Rule 15.1, to present its own statement of the case.[2]

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[1] For example, included in their appendix are letters from federal officials to Petitioners' counsel, dated March 2 and March 8, 1994 (Petitioners' Appendix S, A173-A175); press releases and newspaper articles, dated May 13, 1994 (Petitioners' Appendix Z, A233-234) and March 10, 1994 (Petitioners' Appendix AA, A235); and a summary chart Petitioners prepared which includes self-serving entries such as the one stating that "Georgia and Virginia are struggling toward settlement." (Petitioners' Appendix CC, A238).

[2] Respondents made similar mischaracterizations when the Court of Appeals for the Fourth Circuit reviewed the Secretary of Revenue's qualified immunity defense in *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 871, 116 L. Ed. 2d 777 (1992). That decision is instructive because the Court of Appeals rejected Respondents' one-sided version of North Carolina's response to *Davis*. *Powers*, 937 F.2d at 971-72.

STATEMENT OF THE CASE

On March 28, 1989, this Court invalidated Michigan's laws which afforded more favorable income tax treatment to retired state employees' pensions than to retired federal employees' pensions. *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989). The Court held that such differential tax treatment discriminated against federal retirees based solely on the federal source of their pensions in violation of the doctrine of intergovernmental tax immunity and the Public Salary Tax Act of 1939, 4 U.S.C. § 111. When *Davis* was decided, North Carolina exempted from state income taxation all retirement income of state and local government employees and teachers but exempted only $3,000 of federal pension income. After *Davis*, North Carolina equalized the tax treatment of state and federal pensions, retroactive to January 1, 1989, by repealing the tax exemption for state retirement benefits and enacting a $4,000 exclusion for the retirement benefits of both state and federal employees. (1989 N.C. Sess. Laws, ch. 792, § 1.1). Class A Petitioners are federal civil service and military pensioners[3] who seek refund of state income taxes paid on their pre-*Davis* federal pension income.

At the time of the *Davis* decision, North Carolina also excluded from state income taxation the first $1,500

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[3] For income tax purposes, North Carolina did not draw a distinction between federal civil service and military pensions. *See Barker v. Kansas*, 503 U.S. ___, 112 S. Ct. 1619, 118 L. Ed. 2d 243 (1992).

of the service pay of North Carolina National Guardsmen[4] but conferred no comparable benefit on federal military reservists or active duty personnel who paid North Carolina state income taxes. Class B Petitioners are active duty and reserve members of the federal armed forces who seek refund of taxes paid on their military service pay because they did not receive the tax benefit extended to members of the North Carolina National Guard.

Respondents are the State of North Carolina, the Secretary of the North Carolina Department of Revenue, and the State Treasurer.

Within days after the *Davis* decision, the Secretary of Revenue sought an opinion from the North Carolina Attorney General regarding the effect of *Davis* on the State income tax system and the proper procedure for refunding unconstitutional taxes. On April 10, 1989, the Attorney General advised the Secretary that all persons who met the requirements of the pertinent North Carolina tax refund statute, N.C. Gen. Stat. § 105-267, were entitled to refunds. The Secretary of Revenue then issued a press release announcing the Department of Revenue would issue refunds accordingly. *See Powers*, 937 F.2d at 971-72.

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[4] N.C. Gen. Stat. § 105-141(b)(25). This exclusion was made a tax deduction for tax year 1989, N.C. Gen. Stat. § 134.6(b)(4), and repealed effective January 1, 1990. (1989 N.C. Sess. Laws, ch. 1002 (1990)).

N.C. Gen. Stat. § 105-267[5] provides that a taxpayer challenging the constitutionality of a tax must pay the tax and protest its legality by demanding a refund within 30 days of payment. The taxpayer then has three years within which to bring suit if the Secretary of Revenue denies the demand or takes no action on it within 90 days. N.C. Gen. Stat. § 105-267 and its predecessor statutes have been in place for over 100 years. The Supreme Court of North Carolina has held that it is the exclusive method by which a taxpayer can challenge the constitutionality of a State tax statute and obtain a refund of taxes paid under that statute. *Swanson III*, 335 N.C. at 680, 441 S.E.2d at 541; *see also Bailey v. North Carolina*, 330 N.C. 227, 235, 412 S.E.2d 295, 300 (1991), *cert. denied*, 504 U.S. ___, 112 S. Ct. 1942, 118 L. Ed. 2d 547 (1992) (Applying N.C. Gen. Stat. § 105-267 to deny claims of State pensioners that taxation of their retirement benefits pursuant to a statute equalizing the tax treatment of State and federal pension income following *Davis* violated their constitutional rights); *Coca-Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977) (N.C. Gen. Stat. § 105-267 is the exclusive method to challenge the constitutionality of a State tax statute, and failure to meet its requirements bars refund claim); *Kirkpatrick v. Currie*, 250 N.C. 213, 108 S.E.2d 209 (1959) (N.C. Gen. Stat. § 105-267 accords taxpayer due process of law and is constitutional); and *Richmond & Danville R.R. Co. v. Reidsville*, 109 N.C. 494, 13 S.E. 865 (1891) (Failure

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[5] The text of N.C. Gen. Stat. § 105-267 is set out in Respondents' Appendix at page 1a.

to demand refund of tax within 30 days of payment pursuant to predecessor statute to N.C. Gen. Stat. § 105-267 bars claim for refund of tax collected pursuant to an allegedly unconstitutional statute).

Many federal pensioners met the requirements of N.C. Gen. Stat. § 105-267 and received refunds of taxes paid on their 1988 federal pension income. As of February 19, 1990, North Carolina had honored 12,404 such claims and refunded a total of $9,145,523.92. *Swanson III*, 335 N.C. at 682 n. 1, 441 S.E.2d at 542 n. 1. For those federal pensioners who failed to make timely refund demands because *Davis* was decided so near the April 17, 1989 filing deadline, the North Carolina General Assembly enacted a special tax credit permitting them to recover over a period of three years the taxes paid on their 1988 federal pension income. (1989 N.C. Sess. Laws, ch. 984, § 6, codified as N.C. Gen. Stat. § 105-151.20). *See Swanson III*, 335 N.C. at 687-88 n. 3, 441 S.E.2d at 545 n. 3. Thus, federal pensioners received either a refund or a tax credit for state taxes paid on their 1988 federal pension income.[6]

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[6] Petitioners' refund claims are limited to taxes paid on their 1988 federal pension income and cannot include previous years. Failure to protest within 30 days after paying the tax due for any year extinguishes a refund claim for that year. By the express words of N.C. Gen. Stat. § 105-267, a protest in later years cannot revive an extinguished claim since the belated protest would not come within "30 days after payment" of "the tax paid"

(continued...)

On April 14, 1989, barely two weeks after *Davis*, Class A Petitioners sued Respondents (except the State of North Carolina) for declaratory and injunctive relief and damages under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of North Carolina. Relying on *Davis*, they alleged that the State officials had unconstitutionally collected income tax on their federal pension income. Class B Petitioners were allowed to join the action as plaintiffs early in 1990. All Petitioners' claims for damages were dismissed in August 1990, except for claims against the Secretary of Revenue in her individual capacity. As to those claims, the District Court rejected the Secretary's qualified immunity defense. The United States Court of Appeals for the Fourth Circuit reversed, holding that the individual claims against the Secretary of Revenue should also have been dismissed. *Powers*, 937 F.2d at 971, 973. On May 6, 1994, the District Court granted summary judgment for the Respondents on all remaining claims. (Petitioners' Appendix H, A79-A88).

On March 16, 1990, Petitioners sued the Respondents in state court for tax refunds in excess of

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[6](...continued)
in the earlier year. Therefore, if a federal retiree in 1989 timely protested the payment of state tax on his 1988 pension income, his cause of action would be limited to a refund of 1988 taxes, and he would have a three-year limitations period within which to file his action to recover a refund for that year if his demand was not honored.

$140,000,000, exclusive of interest, again asserting that North Carolina had unconstitutionally collected income tax on their federal pensions and military pay. Respondents asserted a number of affirmative defenses, including the defenses that the *Davis* case should be applied prospectively only and that Petitioners were barred by their failure to comply with N.C. Gen. Stat. § 105-267.

On October 3, 1990, the state trial court granted Petitioners' motion for summary judgment, allowing refunds for the Class A Petitioners for taxable years 1985-1988 and for the Class B Petitioners for taxable years 1986-1989. On appeal to the Supreme Court of North Carolina, Respondents raised seven issues including whether *Davis* should be applied prospectively only, whether *Davis* was even applicable to the National Guard tax benefit,[7] and whether Petitioners met the timely notice and payment under protest requirements of N.C. Gen. Stat. § 105-267.

On August 14, 1991, the Supreme Court of North Carolina reversed the trial court and held that Petitioners were not entitled to refunds because *Davis* should be applied prospectively only. *Swanson v. North Carolina (I)*, 329 N.C. 576, 407 S.E.2d 791 (1991). The Court

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[7] None of the Class B Petitioners were entitled to refunds on the additional and independent ground that the National Guard tax benefit did not constitute discriminatory taxation in violation of the Public Salary Tax Act or this Court's decision in *Davis*. *See* Argument II, *infra*, at pages 24-27.

granted Petitioner's rehearing request and reaffirmed its initial decision on December 6, 1991. *Swanson v. North Carolina (II)*, 330 N.C. 390, 410 S.E.2d 490 (1991).

This Court reviewed the decisions in *Swanson (I) and (II)* by writ of *certiorari* and reversed and remanded for reconsideration in light of *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 113 S.Ct. 41, 125 L. Ed. 2d 74 (1993). *Swanson v. North Carolina*, 509 U.S. ___, 113 S. Ct. 3025, 125 L. Ed. 2d 713 (1993). On remand, the case was reargued after additional briefing. On March 4, 1994, the Supreme Court of North Carolina held in *Swanson III* that N.C. Gen. Stat. § 105-267 met the due process requirements enunciated in *McKesson v. Florida Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), and reiterated in *Harper* and dismissed Petitioners' refund claims for failure to comply with N.C. Gen. Stat. § 105-267. The present petition for writ of *certiorari* followed.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

This is not a proper case for allowing the writ of *certiorari* because the North Carolina Supreme Court correctly applied this Court's decisions in determining: (1) that the procedural requirements of N.C. Gen. Stat. § 105-267, including its timely notice and payment under protest provisions, fully satisfy due process standards, as enunciated in *McKesson* and reiterated in *Harper*; and (2) that Petitioners' failure to comply with these valid procedural requirements barred their refund claims. The

petition should not be allowed as to Class B Petitioners' refund claims for the additional reason that the former National Guard tax benefit did not constitute discriminatory taxation in violation of the Public Salary Tax Act or this Court's decision in *Davis*.

I. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *McKESSON* AND *HARPER* IN DETERMINING THAT PETITIONERS WERE NOT DEPRIVED OF DUE PROCESS WHEN THEIR REFUND CLAIMS WERE DENIED FOR FAILURE TO MEET THE PROCEDURAL REQUIREMENTS OF NORTH CAROLINA'S REFUND STATUTE, N.C. GEN. STAT. § 105-267.

1. N.C. Gen. Stat. § 105-267 met the requirements of due process by providing Petitioners with the opportunity to obtain meaningful backward-looking relief in the form of refund of taxes paid on their federal pension income in 1988.

N.C. Gen. Stat. § 105-267 forbids predeprivation challenges to the collection of a tax and provides instead for the refund of unlawful taxes to taxpayers who make timely refund demands. Years before *Davis* was decided the Supreme Court of North Carolina had held that N.C. Gen. Stat. § 105-267 is the exclusive method by which a taxpayer can challenge the constitutionality of a State

tax statute and obtain a refund. *Coca Cola v. Coble*, 293 N.C. 565, 238 S.E.2d 780 (1977). Taxpayers were on notice of both the statute and the *Coca-Cola* decision long before *Davis* was decided.

In *Swanson III* the Supreme Court of North Carolina rejected Petitioners' contention that they were deprived of due process when State officials denied their refund claims for failure to meet N.C. Gen. Stat. § 105-267's requirements:

> Plaintiffs [Petitioners before this Court] contend the statutory refund procedure transgresses the Due Process Clause of the Fourteenth Amendment of the United States Constitution insofar as it bars full refunds to plaintiffs for tax years 1985 through 1988 which, plaintiffs contend, are required by the United States Supreme Court's decision in *Harper v. Virginia Department of Taxation*, 509 U.S. ___, 125 L. Ed. 2d 74.
>
> We do not agree. Rather, we conclude that in light of both *Harper* and *McKesson Corporation v. Division of Alcoholic Beverage and Tobacco*, 496 U.S. 18, 110 L. Ed. 2d 17 (1990), the refund procedure provided in section 105-267 is free from any constitutional infirmity. It may, therefore, effectively bar actions for

> refunds in the tax years for which the procedure was not followed.

Swanson III, 335 N.C. at 684, 441 S.E.2d at 543.

Penetrating to the heart of the case, the North Carolina Supreme Court held that the timely notice and payment under protest provisions in N.C. Gen. Stat. § 105-267 were identical to those approved by this Court in *McKesson*:

> Plaintiffs contend, nevertheless, that the State cannot, consistent with due process, deprive them of full refunds of all taxes paid in all tax years within the period of the statute of limitations *even though these taxes were not duly challenged under the procedures established by section 105-267.* Again, *McKesson* answers this contention adversely to plaintiffs' position.
>
> *McKesson* holds that a state may provide full refunds to taxpayers, and at the same time, protect its fiscal stability by imposing "various procedural requirements on actions" seeking such remedies:
>
> > The State might, for example, provide by statute that refunds will be *available only to those taxpayers paying under protest or providing some timely notice of complaint*;

> execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions
> . . . The State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax.

Id. at 45, 110 L. Ed. 2d at 41. Indeed, in remanding the case to the Florida Supreme Court, the United States Supreme Court noted, "upon remand the State may invoke as an independent basis for refusing to provide a refund, petitioner's failure to comply with a notice requirement that was in effect at the time of petitioner's tax payments." *Id.* at 24 n.4, 110 L. Ed. 2d at 28 n.4.

North Carolina thus gives taxpayers desiring to challenge the illegality, or unconstitutionality, of a tax a clear and certain remedy and meaningful, backward-looking relief by providing a full refund of the tax if the challenge is successful. It also provides a clear and fair opportunity to contest the tax by the procedures set out in section 105-267. Denial of refunds to

> taxpayers for the tax years for which they failed to comply with this procedure does not, as the Court made clear in *McKesson*, deprive these taxpayers of constitutional due process.

Swanson III, 335 N.C. at 686-87, 441 S.E.2d at 544-45. (Emphasis added).

The Supreme Court of North Carolina rejected Petitioners' argument that *Harper* had somehow modified *McKesson*. *Swanson III*, 335 N.C. at 688, 441 S.E.2d at 545-46. It determined that "[t]he *Harper* Court did not fashion a new test for due process. Instead, it relied on well-established tests enunciated in *McKesson* and earlier cases." *Swanson III*, 335 N.C. at 689, 441 S.E.2d at 546:

> Thus, *Harper* did not modify the Court's previous jurisprudence, including *McKesson*, regarding the tests for determining whether a state's postdeprivation remedy by which a tax may be challenged on legal or constitutional grounds satisfies due process. Rather, the *Harper* Court made it clear that a state satisfied due process if it offered taxpayers relief consistent with the due process standards delineated in *McKesson*.

Swanson III, 335 N.C. at 691, 441 S.E.2d at 547.

The Supreme Court of North Carolina was plainly correct in holding, based on *McKesson*, that N.C. Gen. Stat. § 105-267, both on its face and as applied to Petitioners' claims, met the requirements of due process. *McKesson* expressly held that the Due Process Clause does *not* require a predeprivation remedy for unconstitutional taxation and that states may fully satisfy their due process obligations to taxpayers by providing "a meaningful *opportunity* to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *McKesson*, 496 U.S. at 22. (Emphasis added). In *McKesson*, the Court further expressly held that states may constitutionally protect their financial security by limiting taxpayers' opportunities for refunds of taxes collected pursuant to a statute later held unconstitutional to those taxpayers who comply with procedural requirements such as timely notice and payment under protest.

McKesson draws upon a long line of cases holding that the Due Process Clause calls for a balancing of the interests of citizens and government. *See, e.g., Matthews v. Eldridge*, 424 U.S. 319 (1976). The Court has consistently recognized that where the state's interest is one of overriding significance, citizens may be deprived of property without a prior hearing. Tax collection is such an area. *See, e.g., Bob Jones University v. Simon*, 416 U.S. 725 (1974); *Phillips v. Commissioner*, 283 U.S. 589, 595-97 (1931); *Dodge v. Osborn*, 240 U.S. 118 (1916); *see also*, Lawrence H. Tribe, *American Constitutional Law*, § 10-14 at 720-21 (2d ed., 1988). Balancing the interests of taxpayers and the government,

the Court held that states may adopt postpayment remedies because "[a]llowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult." *McKesson*, 496 U.S. at 36-37. The Court reiterated that "States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions . . . . Such procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation." *McKesson*, 496 U.S. at 50.

This Court's holding in *McKesson* is clear and unambiguous: statutory preconditions to obtaining refunds, such as timely notice and payment under protest, do not deny due process and are constitutional. *Harper* in no way changes this result. North Carolina's refund statute, N.C. Gen. Stat. § 105-267, incorporates the very procedural safeguards this Court expressly approved in *McKesson*. Thus, the Supreme Court of North Carolina correctly applied *Harper* and *McKesson* in holding that N.C. Gen. Stat. § 105-267 is constitutional.

Petitioners nevertheless persist in portraying themselves as victims of an unfair application of N.C. Gen. Stat. § 105-267. They first contend that giving timely notice and paying under protest would have been futile because the Department of Revenue lacked the power to declare a State tax statute unconstitutional. Petitioners overlook the facts. Within days of the *Davis* decision, Department of Revenue officials sought and received the advice of counsel and later, based on the Supremacy Clause of the United States Constitution and this Court's decision in *Davis*, *made refunds* totalling over $9,000,000 to more than 12,000 federal pensioners who met the requirements of N.C. Gen. Stat. § 105-267.

Second, petitioners argue that the timely notice and payment under protest provisions of N.C. Gen. Stat. § 105-267 serve no valid purpose. As this very case illustrates, constitutional challenges can put a staggering amount of revenue at risk and can imperil the financial stability of a state and its ability to serve all of its citizens. As this Court observed in *McKesson*, states must be able to protect public revenues intended for the benefit of all citizens. The 30-day refund demand requirement gives the State notice of potential claims upon public funds, and the 90-day delay provides the Department of Revenue a reasonably short period to pay meritorious claims and thereby avoid needless litigation. In the case of a demand not honored within 90 days, the taxpayer can immediately present any constitutional challenge he may have to the Superior Court. N.C. Gen. Stat. § 105-267's requirements afford the State some measure of fiscal protection while assuring taxpay-

ers ready access to a court of competent jurisdiction to adjudicate constitutional claims. *Cf. Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). Petitioners are simply wrong in saying the requirements of N.C. Gen. Stat. § 105-267 serve no valid purpose.

Third, Petitioners claim that the Department of Revenue's bulletins and instruction pamphlets were "affirmatively misleading" because they discussed the three-year period for requesting the refund of an overpayment due to a computational error but failed to explain how to make a constitutional challenge under N.C. Gen. Stat. § 105-267. The Court of Appeals for the Fourth Circuit rejected this notion:

> Plaintiffs' argument that Powers "changed" the refund procedures relies substantially upon statements in income tax bulletins regarding the statute of limitations. *We find this reliance misplaced because the bulletins clearly state in their preface that they "do not cover all phases of the law."* In fact, only the refund procedures under Gen. Stat. § 105-266 for routine overpayments due to miscalculation are discussed; the bulletins do not mention Gen. Stat. § 105-267, which applies to refunds of unconstitutional taxes.

Powers, 937 F.2d at 972. (Emphasis added).

Unlike the Petitioners, the Court of Appeals recognized that these kinds of publications cannot, and need not, be all-inclusive. The purpose of these bulletins and pamphlets is to present general information having the greatest interest to the largest number of taxpayers. These publications were not intended to address exceptional circumstances. Rather, they were designed to answer the kind of questions the average taxpayer is likely to have as he fills out his return. Since computational errors are common and constitutional challenges are rare, it is entirely reasonable for tax instructions and bulletins to describe only the refund procedure for routine overpayments and to put the taxpayer on notice that the publications "do not cover all phases of the law."

Fourth, Petitioners contend that application of N.C. Gen. Stat. § 105-267's procedural requirements to their refund claims was an abrupt after-the-fact change in policy formulated to deprive them of refunds. The Court of Appeals in *Powers* found this argument implausible:

> The thirty-day period for requesting refunds of unauthorized taxes is set by statute, not by the whims of the Secretary of Revenue. *See* N.C. Gen. Stat. § 105-267 (1989). Payment of the tax followed by a request for a refund is the exclusive means for remedying an unconstitutional tax in North Carolina. *Coca-Cola*, 238 S.E.2d at 783. Furthermore, the statutory require-

> ment that taxpayers demand refunds of invalid taxes within thirty days of payment has been North Carolina law for approximately fifty years, which must have provided plaintiffs some minimum of notice.

Powers, 937 F.2d at 971.[8]

Fifth, Petitioners contend that the Supreme Court of North Carolina somehow deprived them of due process by holding that each member of a class of taxpayers challenging the validity of a tax must meet the timely notice and payment under protest provisions of N.C. Gen. Stat. § 105-267. *See Swanson III*, 335 N.C. at 680-83, 441 S.E.2d at 542-43. In North Carolina, a class action can be used to aggregate valid claims for litigation, but claims which have already expired as a matter of law for failure to preserve them cannot be resurrected by combining them or mixing them with valid claims. The Secretary of Revenue's refusal to accept Petitioners' class demands did not deny them due process. Her reply describing the kind of information needed to identify taxpayers with valid claims did not impose new conditions. It simply explained why Petitioners' collective demand for refunds was insufficient to separate valid individual claims from those that had expired. *Swanson III*, 335 N.C. at 682-83, 441

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[8] Predecessor statutes to N.C. Gen. Stat. § 105-267 date back to 1887. *See Kirkpatrick v. Currie*, 250 N.C. 213, 215, 108 S.E.2d 209, 210 (1959).

S.E.2d at 542-43. There was nothing unconstitutional about this.

Finally, Petitioners assert that by relying on N.C. Gen. Stat. § 105-267 North Carolina has in effect blocked retroactive application of *Davis*. To the contrary, North Carolina has simply protected its fiscal stability by using the very procedures this Court unanimously approved in *McKesson*. North Carolina has met and exceeded the due process requirements enunciated in *McKesson* and reiterated in *Harper* by providing refunds for those federal pensioners who complied with the procedural requirements of N.C. Gen. Stat. § 105-267 and by giving tax credits to those who did not. The Supreme Court of North Carolina correctly applied *Harper* and *McKesson* in *Swanson III*, and there is no need for this Court to review that decision by *certiorari*.

2. The Supreme Court of North Carolina correctly declined to give preclusive effect to a preliminary jurisdictional finding by the District Court in Petitioners' federal litigation.

Petitioners initially sued the Respondents in the United States District Court for the Eastern District of North Carolina in April 1989. Ruling on Respondents' motion to dismiss that action for lack of subject matter jurisdiction, Judge Malcolm H. Howard found that N.C. Gen. Stat. § 105-267, as applied to Petitioners' claims, was not a "plain, speedy and efficient" remedy within the meaning of the Tax Injunction Act, 28 U.S.C. § 1341. He then dismissed on Eleventh Amendment

grounds Petitioners' claims for monetary damages against all State officials except Secretary of Revenue Helen Powers, leaving only Petitioners' claims for prospective declaratory and injunctive relief.

Secretary Powers appealed, and the Court of Appeals for the Fourth Circuit reversed, concluding that Powers was entitled to qualified immunity and that no claim lay against her in her individual capacity. *Powers, supra.* In its review of Secretary Powers' immunity claim, the Court of Appeals rejected arguments Judge Howard had relied upon in ruling on the Tax Injunction Act, thereby severely undermining his finding that N.C. Gen. Stat. § 105-267 was not a "plain, speedy and efficient" remedy as to Petitioners' claims. Following the reversal by the Court of Appeals, the federal case lay dormant for several years while Petitioners pursued their state court action.

After this Court's remand of *Swanson I and II* for reconsideration in light of *Harper* in June 1993, Petitioners moved the federal District Court for entry of judgment. They contended that the court's jurisdictional finding was binding upon Respondents and that *Harper* mandated refunds in the absence of a predeprivation remedy. They also told Judge Howard they wanted the judgment so they could demand that the Supreme Court of North Carolina give it *res judicata* effect in *Swanson III*. Respondents countered that the federal court docket entries indicated the case had been closed without any final judgment, that the jurisdictional finding was not a decision on the merits of Petitioners' due process claims,

that Petitioners had misinterpreted *Harper* and *McKesson*, and that the Eleventh Amendment barred entry of a judgment designed to control the decision in *Swanson III*, then pending before the Supreme Court of North Carolina on remand from this Court. *See Green v. Mansour*, 474 U.S. 64 (1985); *Edelman v. Jordan*, 415 U.S. 651 (1974).

While their motion for entry of judgment in federal court was pending, Petitioners demanded that the Supreme Court of North Carolina give preclusive effect to Judge Howard's jurisdictional finding and asked that Court to enter judgment in their favor. In *Swanson III*, the Supreme Court of North Carolina declined, noting that "[i]n the federal case, by an order dated 26 October 1993, United States District Court Judge Malcolm H. Howard found that 'a final judgment has not been issued in this case. . . .'" *Swanson III*, 335 N.C. at 692, 441 S.E.2d at 548. Thus, there was no basis to require the North Carolina Supreme Court to give the jurisdictional finding preclusive effect. This conclusion was later reinforced in Judge Howard's May 6, 1994 order granting summary judgment to Respondents in the federal action:

> This court's August 16, 1990, order was a finding for the purposes of jurisdiction under the Tax Injunction Act. It was *not* a determination that N.C. Gen. Stat. § 105-267 violated the due process clause. Plaintiffs litigated their due process claim in front of the state supreme court and

> lost. This court is required, as a matter of federal law, to give preclusive effect to a judgment of the North Carolina Supreme Court.

Judge Howard's Order, Petitioners' Appendix, at page A-85. (Emphasis added). Judge Howard was correct that the law compelled this result. *See Parson's Steel Inc. v. First Alabama Bank*, 474 U.S. 518 (1986); *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982).

Thus, the federal judge who made the Tax Injunction Act finding did not consider it to have sufficient finality for preclusive effect, and the Supreme Court of North Carolina agreed. There is no need for this Court to review the Supreme Court of North Carolina's decision on this point by *certiorari*.

II. AS TO CLASS B PLAINTIFFS' CLAIMS, THE PETITION SHOULD BE DENIED FOR THE ADDITIONAL REASON THAT THE FORMER STATUTORY INCOME TAX BENEFIT FOR NATIONAL GUARD MEMBERS WAS NOT DISCRIMINATORY TAXATION IN VIOLATION OF THE PUBLIC SALARY TAX ACT OR CONTRARY TO THIS COURT'S DECISION IN *DAVIS V. MICHIGAN DEPARTMENT OF TREASURY*.

Class B Petitioners claim that the former North Carolina National Guard tax benefit constituted discrimi-

natory taxation in violation of the Public Salary Tax Act and was contrary to this Court's decision in *Davis*. This contention is premised on a superficial application of the *Davis* decision and on the mistaken assumption that federal reservists and active duty military personnel were paid from the United States Treasury but that North Carolina National Guardsmen were paid from the State treasury. The two groups are actually compensated from the same source -- the United States Treasury. Thus, there was no discrimination against federal officers or employees based solely on the federal source of their compensation -- the underpinning of the Public Salary Tax Act and the intergovernmental tax immunity doctrine.

In *Perpich v. Department of Defense*, 496 U.S. 334 (1990), this Court traced the evolution of the National Guard and explained that since 1933 all persons serving in state national guard units have dual appointments, either by enlistment or commission, in both the state national guard and the National Guard of the United States. The Court noted that, "[t]he Federal Government provides virtually all of the funding, materiel, and leadership for the State Guard units." *Perpich*, 496 U.S. at 351. In North Carolina, State law provides for payment for national guard service from State funds *only* when members of the national guard are called into State service by the Governor to execute the laws, secure the safety of persons and property, suppress riots or insurrection, repel invasions or provide disaster relief. N.C. Gen. Stat. §§ 127A-16, -105 and -106. As the Court of Appeals for the Fourth Circuit noted, the

federal government in 1989 paid more than 99 per cent of the compensation for personal service disbursed to North Carolina National Guardsmen. *Powers*, 937 F.2d at 972-73.

The Public Salary Tax Act was enacted to authorize states to tax federal compensation as long as the state tax does not discriminate *based solely on the federal source of the compensation*. The critical determinant for intergovernmental tax immunity and Public Salary Tax Act analysis is the *source* of the compensation to be taxed. Since both the Class B Petitioners and members of the North Carolina National Guard were paid from the federal treasury, the tax benefits formerly accorded to North Carolina National Guardsmen did not discriminate against federal reservists or active duty military personnel based on the federal source of their pay. The *Davis* decision and the Public Salary Tax Act simply do not recognize claims of discrimination as between groups of federally compensated employees.[9]

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[9] Even assuming *arguendo* that the Public Salary Tax Act and the doctrine of intergovernmental tax immunity are somehow applicable, significant differences between the duties of the federal armed forces and North Carolina National Guard would nonetheless justify disparate treatment. *Davis*, 489 U.S. at 815-17. The tax benefit partly compensated State national guard soldiers for remaining available for State emergency service when called by the Governor -- an obligation over and above their federal military obligation and one not shared by federal reservists and active duty military

The Class B Petitioners have not suffered discrimination based on the federal source of their pay. The tax benefit formerly extended to North Carolina National Guardsmen did not violate the Public Salary Tax Act or the principles of intergovernmental tax immunity enunciated in *Davis*. Class B Petitioners' petition for a writ of *certiorari* should not be granted for this additional reason.

CONCLUSION

The petition should be denied. The North Carolina Supreme Court correctly applied this Court's decisions in determining that North Carolina's refund statute, N.C. Gen. Stat. § 105-267, met the requirements of due process as enunciated in this Court's unanimous decision in *McKesson* and reiterated in *Harper*. That Court also correctly determined that Petitioners' failure to meet the exclusive and longstanding procedural requirements of N.C. Gen. Stat. § 105-267 barred their refund claims. As to Class B Petitioners, the petition should be denied for the additional reason that the former National Guard tax benefit did not constitute discriminatory taxation in violation of the Public Salary Tax Act or this Court's decision in *Davis*.

---

personnel. The national guard tax benefit also served to attract persons interested in the military reserves to choose the North Carolina National Guard.

Respectfully submitted, this the 23rd day of June, 1994.

MICHAEL F. EASLEY
Attorney General

Edwin M. Speas, Jr.
Senior Deputy Attorney General

Thomas F. Moffitt*
Special Deputy Attorney General

Norma S. Harrell
Special Deputy Attorney General

Marilyn R. Mudge
Assistant Attorney General

N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-3786

*Counsel of Record

APPENDIX

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N.C. Gen. Stat. § 105-267 . . . . . 1a

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§ 105-267. Taxes to be paid; suits for recovery of taxes.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10; 1977, c. 946, s. 1.)

No. 93-1882

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

NORMAN W. SWANSON, *et al.*,
Petitioners,
v.
THE STATE OF NORTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, THE MILITARY COALITION AND DESIGNATED FEDERAL RETIREES IN KANSAS, NEW YORK, ARIZONA, VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONER

ROBERT COSTELLO
GIVNEY, ANTHONY & FLAHERTY, P.C.
665 5th Avenue
Second Floor
New York, New York 10022
(212) 688-5151

JOHN J. PHELAN, III
JOHN J. PHELAN, III, P.C.
1414 Avenue of the Americas
New York, New York 10019
(212) 688-8088

EUGENE O. DUFFY
O'NEIL, CANNON & HOLLMAN, S.C.
Suite 1400
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 276-5000

MICHAEL J. KATOR *
STEPHEN Z. CHERTKOF
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800

MARK L. WEYMAN
ROBERTO VELEZ
ANDERSON, KILL, OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-9363

KENTON C. GRANGER
RAYMOND L. DAHLBERT
NIEWALD, WALDECK & BROWN, P.C.
9401 Indian Creek Parkway
Corporate Woods, Building 40
Suite 550
Overland Park, KS 66225
(913) 451-1717

* Counsel of Record

[Additional Counsel on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BRIAN A. LUSCHER
BONN, LUSCHER, PADDEN &
WILKINS, CHARTERED
805 N. Second Street
Phoenix, AZ 85004
(602) 254-5557

JOHN C. FRIEDEN
KEVIN M. FOWLER
FRIEDEN, HAYNES & FORBES
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

June 23, 1994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1882

NORMAN W. SWANSON, *et al.*,
Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin move for leave to file a brief *amici curiae* in support of petitioner. Counsel for respondent refused to consent to the filing of this brief.

NARFE is a nonprofit incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership of approximately a half a million federal annuitants (retirees and survivors) living throughout the Nation and in various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and it has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems over the past six decades.

While NARFE principally focuses on legislative and administrative issues affecting federal retirees, on a hand-

ful of occasions, either directly or as *amicus,* NARFE has been involved in litigation in this Court. Most recently, NARFE has been involved in the litigation emanating from the states' discriminatory taxation of federal retirement benefits. Because this discriminatory taxation practice was widespread, NARFE participated as *amicus* in *Davis v. Michigan Department of Treasury,* 489 U.S. 803 (1989). Similarly, NARFE members brought the case of *Harper v. Virginia Department of Taxation,* 113 S. Ct. 2510 (1993), which challenged states' reliance on nonretroactive decisionmaking to deny refunds to federal retirees who had paid the taxes invalidated by *Davis.*

This case raises the question, left open in *Harper,* of whether "federal law . . . necessarily entitle[s the retirees] to a refund." *Harper,* 113 S. Ct. at 2520. The majority of the 23 states that imposed *Davis*-type taxes have now refunded (or agreed to refund) those taxes to the federal retirees. Several states, however, are continuing their efforts to avoid their obligations to refund the taxes they unconstitutionally imposed on federal retirees. NARFE and its members in these remaining states are vitally interested in seeing that this litigation is finally put to rest and that refunds are finally paid. Moreover, because the issues raised in this petition affect the ability to recoup all types of unlawful taxes, NARFE and its members nationwide are interested in assuring that states cannot stack the deck against them and other taxpayers who seek refunds of erroneously or unlawfully collected taxes.

The Military Coalition is a voluntary association of 24 military-related organizations that was formed six years ago. Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. The Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issues impacting upon the maintenance of a strong national defense and the preservation of rights

and benefits its varied constituents have earned through years of dedicated service to the United States.

Resolution of the issues presented in this petition are of vital interest to the Military Coalition and the members of its constituent organizations. Not only do some of these members live in states where *Davis* litigation is ongoing, but all its members are interested in seeing a fair and evenhanded mechanism for challenging unconstitutional state taxation.

The designated federal retirees in Kansas, New York, Arizona, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. While partial resolution of the *Davis* litigation has been announced or implemented in some of these states, nonetheless until all the remaining issues in these states are finally resolved, these class representatives will remain interested in all the legal issues arising out of the *Davis* litigation.

For these reasons, *amici* desire to have their voices heard in this case. This is not a case that simply involves one state or presents one isolated issue. The ramifications of the decision below are widespread and there are over two and a half million individuals who are interested in seeing that that decision is reviewed and reversed. Accordingly, pursuant to Rule 37.2, *amici* move for leave to file this brief in support of petitioners.

Respectfully submitted,

MICHAEL J. KATOR *
STEPHEN Z. CHERTKOF
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800

* Counsel of Record

QUESTION PRESENTED

Whether a state postdeprivation remedy that is neither "plain, speedy and efficient" nor "plain, adequate and complete" can be sufficient to satisfy the Fourteenth Amendment's requirement that states provide either a "clear and certain" predeprivation remedy or a "clear and certain" postdeprivation remedy designed to prevent the deprivation of property from becoming permanent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1882

NORMAN W. SWANSON, *et al.*,
Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, THE MILITARY COALITION AND DESIGNATED FEDERAL RETIREES IN KANSAS, NEW YORK, ARIZONA, VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONER

The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin file this brief *amici curiae* in support of petitioner and urge this Court to grant the petition for a writ of certiorari and reverse the decision of the Supreme Court of North Carolina.

INTEREST OF AMICI

Amici are NARFE, the Military Coalition and designated federal retirees in Kansas, New York, Virginia, Arizona and Wisconsin. NARFE is a not for profit corporation that is dedicated to serving and protecting the interests of federal civil service retirees and the federal retirement systems. As more fully set out in the foregoing motion, NARFE and its members are vitally interested in the issue of taxpayers' entitlement to receive refunds of unconstitutional state taxation.

The Military Coalition is a voluntary association of 24 military-related organizations that was formed six years ago. *See* App. 1a-8a (providing a listing of its component organizations). Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. As more fully stated in the preceding motion, the Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issues impacting upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States. It and the members of its constituent organizations are affected directly by the decision below.

The designated federal retirees in Kansas, New York, Arizona, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. *See* App. 8a-9a (listing individual class representatives). They, or litigants from their states, have previously appeared in this Court as parties seeking the same or similar relief.

STATEMENT

This case is but the latest in a long line of cases coming to this Court challenging a state's denial of refunds of taxes imposed on federal retirees in violation of 4 U.S.C. § 111. Since this Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), this Court has seen 22 petitions from 15 states.[1] This Court has granted plenary review in three post-*Davis* cases[2] and it has yet to allow a state to refuse to refund taxes unconstitutionally imposed on federal retirees.

The states' war of attrition against federal retirees has been fought on several fronts. First and foremost, the states sought to rely on nonretroactive decisionmaking to deny refunds. While some state courts were unimpressed by these arguments,[3] the nonretroactivity defense was not

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[1] Arkansas—*Pledger v. Bosnick*, 113 S. Ct. 3034 (1993); Arizona—*Estate of Bohn v. Waddell*, 113 S. Ct. 3000 (1993); Colorado—*Kuhn v. Colorado*, 112 S. Ct. 1925 (1992); Georgia—*Reich v. Collins*, 113 S. Ct. 3025 (1993) and 114 S. Ct. 1048 (1994); Iowa—*McManus v. Iowa*, 112 S. Ct. 87 (1991); Kansas—*Barker v. Kansas*, 112 S. Ct. 1619 (1992); Massachusetts—*Filios v. Commissioner of Revenue*, U.S. No. 93-1145; Missouri—*Hackman v. Missouri Director of Revenue*, 493 U.S. 1019 (1990); Montana—*Sheehy v. Montana*, 113 S. Ct. 3025 (1993); New York—*Duffy v. Wetzler*, 113 S. Ct. 3027 (1993); Oregon—*Nutbrown v. Munn*, 112 S. Ct. 867 (1992); North Carolina—*Swanson v. Powers*, 112 S. Ct. 871 (1992) and *Swanson v. North Carolina*, 113 S. Ct. 3025 (1993); South Carolina—*Bass v. South Carolina*, 111 S. Ct. 2881 (1991) and 113 S. Ct. 3025 (1993); Virginia—*Harper v. Virginia Department of Taxation*, 111 S. Ct. 2883 (1991) and 113 S. Ct. 2510 (1993) and *Lewy v. Virginia Department of Taxation*, 111 S. Ct. 2883 (1991) and 113 S. Ct. 3024 (1993); Wisconsin—*Hogan v. Musolf*, 112 S. Ct. 867 (1992).

[2] *Barker v. Kansas*, 112 S. Ct. 1619 (1992); *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993); *Reich v. Collins*, U.S. No. 93-908.

[3] *E.g.*, *Hackman v. Director of Revenue*, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Burns v. New Mexico*, No. SF 89-1314(c) (1st Jud. Dist. Santa Fe County Apr. 5, 1990).

finally laid to rest until this Court's decision last Term in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993). Several states also sought to distinguish between military and civil service retirees, contending that there were "significant differences" between military retirees and state government retirees justifying the discriminatory taxation. This effort was thwarted by this Court's decision in *Barker v. Kansas*, 112 S. Ct. 1619 (1992).

Having lost on nonretroactivity, and having lost in attempting to distinguish military retirement, states have fallen back on what appears to be the last line of defense: the putative availability of predeprivation remedies precludes postdeprivation relief. This is the issue that is before this Court in *Reich v. Collins*, No. 93-908, and pending in appellate courts in Virginia and New York.

Unlike *Reich*, and the Virginia and New York cases, the decision below does not rest on the putative availability of predeprivation relief. Following the lead of the Supreme Court of South Carolina, the court below held that retirees were barred from obtaining refunds because of their failure to follow a putative "pay under protest" postdeprivation remedy.[4]

While this case is distinct from *Reich* in that it involves postdeprivation rather than predeprivation remedies, this distinction is irrelevant for purposes of resolution of this

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[4] The Supreme Court of South Carolina held that South Carolina's refund statute, which provided a refund right to "*any taxpayer* [for] *any* license fee or tax," S.C.Stat. Ann. § 12-47-440 (emphasis added), did not apply to income taxes and that accordingly federal retirees were only entitled to refunds if they had paid their taxes under protest. *Bass v. South Carolina*, 414 S.E. 2d 110, 112 (S.C. 1992), *vacated*, 113 S. Ct. 3025 (1993). Since being remanded from this Court, the South Carolina litigation has been settled: all retirees who filed amended returns will receive full refunds plus interest in 1994; those who did not file amended returns will receive refunds in 1995 and 1996 without interest.

appeal. Indeed, this case and *Reich* are but two sides of the same coin: in *Reich* this Court must decide whether Georgia's putative predeprivation remedies are clear, certain, meaningful and adequate while here the question is whether North Carolina's postdeprivation statute satisfies these constitutional criteria. Thus, while resolution of *Reich* will almost certainly dispose of this case, nonetheless this case presents a comparable vehicle to resolve the issues of substantial importance before the Court in *Reich*.

REASONS FOR GRANTING THE PETITION

This case raises questions of substantial public importance concerning the propriety of states retaining taxes collected in violation of the Constitution and statutes of the United States. This case represents a variation of the recurring theme of the states denying federal rights by denying citizens a remedy for the states' violation of federal rights. Specifically, this case presents the interrelated questions of whether a state may change its postdeprivation remedial rules after the tax has been collected by creating a remedial scheme that is wholly illusory—one that results in the unlawful exaction remaining in the state treasury—where the state provides *no* predeprivation remedies to protect the federal right. Review by this Court is necessary to resolve finally the issue of whether this Court's decisions in *Harper, McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Davis v. Michigan Dep't of Treasury*, and *Atchison, T. & S.F. R. Co. v. O'Connor*, 223 U.S. 280 (1912), may be subverted through the charade of state postdeprivation procedures which do not satisfy constitutional standards.

1. There has been and continues to be an unnecessarily large amount of litigation concerning taxpayer remedies in state courts. This is the *second* petition in this case and the thirteenth to be filed within the last two Terms challenging a state's refusal to refund taxes col-

lected in violation of the intergovernmental tax immunity doctrine.[5] Several of the petitions decided last Term involved the question of whether this Court's decision in *Davis v. Michigan* may be applied nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their retired pay. Now, in the wake of this Court's decision in *Harper* and its prior remand of this case, the issues presented by this petition—whether the states may deny relief under the guise of constitutionally deficient state remedies—is at the forefront of the states' continuing refusal to recognize this Court's decisions as the "controlling statement of federal law." *Harper*, 113 S. Ct. at 2515. The predeprivation variation of this issue—denying relief based on illusory predeprivation remedies—is pending before ths Court in *Reich*.[6] This case squarely presents the

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[5] *See Reich v. Collins*, No. 93-908, *cert. granted*, 114 S. Ct. 1048 (1994); *Pledger v. Bosnick*, No. 91-875, *cert. denied*, 113 S. Ct. 3034 (1993); *Barker v. Kansas*, No. 91-611, *rev'd*, 112 S. Ct. 1619 (1992); *Harper v. Virginia Dep't of Taxation*, No. 91-794, *rev'd*, 113 S. Ct. 2510 (1993); *Colorado v. Kuhn*, No. 91-980, *cert. dismissed*, 112 S. Ct. 1925 (1992); *Swanson v. North Carolina*, No. 91-1486, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Sheehy v. Montana Dep't of Revenue*, No. 91-1478, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Bass v. South Carolina*, No. 91-1697, *cert. granted and judgment vacated*, 113 S. Ct. 3025 (1993); *Norwest Bank Duluth, N.A. v. Minnesota Comm'r of Revenue*, No. 91-2047, *cert. granted and judgment vacated*, 113 S. Ct. 3026 (1993); *Duffy v. Wetzler*, No. 92-521, *cert. granted and judgment vacated*, 113 S. Ct. 3027 (1993); *Reich v. Collins*, No. 92-1276, *cert. granted and judgment vacated*, 113 S. Ct. 3028 (1993); and *Estate of Bohn v. Waddell*, No. 92-1748, *cert. denied*, 113 S. Ct. 3000 (1993).

[6] Identical issues are also pending in the *Davis*-related cases of *Harper, supra*, *Duffy, supra*, and *Gorum v. Commonwealth of Kentucky Revenue Cabinet*, 92-SC-1041-T, Kentucky Supreme Court. An analogous approach has also been successfully asserted by Georgia in *Beam* upon remand to nullify this Court's decision in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). *See James B. Beam Distilling Co. v. Georgia*, 263 Ga. 609, 437 S.E. 2d 782 (1993), *pet'n for cert. pending*, No. 93-1140.

other variation of this issue—denying postdeprivation relief by judicial legerdemain.[7]

While analytically different from the retroactivity issue resolved by this Court in *Harper*, this petition, like the *Reich* petition, presents the same ultimate question of whether states may render the enforcement of federal rights inutile by denying citizens a remedy for the states' violation of federal rights.

The court below held that petitioners were not entitled to relief because they failed to comply with North Carolina's "pay under protest" statute. This very statute, in the federal court version of this litigation, was found to be neither "plain, speedy and efficient" nor "plain, adequate and complete" so as to defeat federal court jurisdiction on Tax Injunction Act and comity grounds. Thus, the court below, over a vigorous dissent, has held that a state remedy insufficiently certain and adequate to preclude federal court jurisdiction is nonetheless sufficiently clear and adequate to meet the demands of Due Process. This anomaly contests the presumption of good faith upon which principles of comity and deference to state courts in state tax matters are predicated; more significantly, it raises serious doubts that the court below has correctly discerned petitioners' rights under the Fourteenth Amendment.

Until definitively ordered by this Court, state courts will continue to engage in a result-oriented search for reasons to deny relief to taxpayers, eschewing their duty to uphold and defend the Constitution of the United

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[7] In a recent shift of position, Wisconsin has switched its *Davis*-related theory of defense from the *Reich* predeprivation shell game to the *Swanson* postdeprivation game. *See* Petitioner's Opening Brief in the case of *Wisconsin Dep't of Revenue v. Hogan*, petition for review pending, 93-CV-2549, Circuit Court for Dane County (partial settlement pending).

States in favor of protecting their states' fiscs.[8] *See* Tatarowicz, *Harper v. Virginia Supports Retroactive Relief From Unconstitutional States Taxes*, 3 Journal of Multistate Taxation 244 (Jan.-Feb. 1994). Review by this Court is thus necessary to resolve this question of demonstrated difficulty and importance.

2. The decision of the North Carolina Supreme Court conflicts with the holdings of the Court in *Harper* and *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of these landmark decisions.

As ably demonstrated in the dissent below, the North Carolina Supreme Court's conclusion that North Carolina's law satisfies due process cannot withstand scrutiny. Pet. at App. A, A-23-25. The decision below "upholds a sham procedure." *Id.* at A-25. The North Carolina Supreme Court simply adopted what "the home crowd wants" as the decision in this case. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 Pepperdine

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[8] In the wake of *Beam*, the states quickly realized that they could no longer rely on the prospectivity defense to defeat the enforcement of federal rights. *See, e.g., Robinson v. City of Seattle*, 119 Wash. 2d 84, 880 P.2d 818, 839-48, *cert. denied*, 113 S. Ct. 676 (1992) (following *Beam* and abolishing the rule of selective prospectivity originally announced in *National Can Corp. v. Washington Dep't of Revenue*, 109 Wash. 2d 878, 749 P.2d 1286, *cert. denied*, 486 U.S. 1040 (1988)). Indeed, upon the completition of briefing and oral argument before this Court in *Harper*, state taxing authorities conceded that it was unlikely that a prospectivity analysis of *Davis* was warranted. They also acknowledged that it was doubtful that *Davis* satisfied the threshold test for prospectivity. *See Harper Oral Argument Addresses Taxpayer Remedy*, TAX ADMINISTRATORS NEWS, December 1992 at 187. However, these state authorities were also quick to point out that hope was not lost because there was now a new game: "procedural bars" to remedies. *Id.* at 144. This was so even though such positions were "meritless." *See, e.g., Brumley v. Utah Tax Comm'n*, 868 P.2d 796 (Utah 1993); *Strelecki v. Oklahoma Tax Comm'n*, 872 P.2d 910 (Okla. 1993).

L. Rev. 227, 230 (1980). However, the decisions of the Court compel much more to satisfy the requirements of due process.

This Court's decision in *McKesson* required that North Carolina provide the petitioners with a postdeprivation procedure that satisfies the requirements of due process: "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40. As clearly established by the record below, the petitioners have been denied all "opportunity to contest the validity of the tax." *Id.*

Here, the clear and certain postdeprivation remedy provided by N.C.G.S. § 105.266.1 was repealed by administrative fiat after the taxes in issue had been collected. Pet. at 5. In its stead, the Attorney General of North Carolina purported to substitute a newly crafted demand rule, which was impossible for the petitioners to satisfy, particularly for tax years that were closed prior to the announcement of this rule. *Id.* In so doing, the State of North Carolina insured that the postdeprivation procedure afforded petitioners was anything but "meaningful;" indeed the procedure was intentionally designed to make "permanent [the] unlawful deprivation of property." *McKesson*, 496 U.S. at 40.

The holding of the court below approving this despotic act is directly contrary to the holdings of the Court in both *McKesson* and *Harper*.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers like petitioners are remitted virtually exclusively to state courts to press their claims for refunds.[9] But it is state courts that have demonstrated the greatest difficulty in applying the

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[9] Indeed, here the court below compounded its error by refusing to recognize the preclusive effect of a federal court order. Pet. at 22.

Fourteenth Amendment. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions to all federal retirees and, indeed, all state taxpayers. Absent review by this Court, "[t]he State too easily avoids its responsibilities and . . . go[es] its way unimpeded and unburdened with any remedy for those who have been wronged during the period of [North Carolina's] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J. dissenting).[10]

3. The result reached by the court below also discriminates based on the origin of the petitioners' claims. In North Carolina, taxpayers seeking to enforce rights secured under state law are assured a clear and certain judicial remedy to obtain refunds. N.C.G.S. § 105-266.1, Pet. at App. G, A-288. This clear and certain remedy is available whether the tax sought to be refunded has been paid with or without protest. *Id.*

A state remedial scheme that provides a clear and certain remedy for claims based on state law but denies that right to taxpayers seeking to enforce constitutional rights is unconstitutional. *See McKnett v. St. Louis & S.F. Ry.* Co., 292 U.S. 230, 234 (1934) ("A state may not discriminate against rights arising under federal law."). *See also Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982) (same).

4. In denying the petitioners refund relief for taxes collected in violation of the principles enunciated in *Davis*, the court below refused to give effect to the settled prac-

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[10] In stark contrast to the decision below, in those rare circumstances where federal courts have been able to exercise jurisdiction, there has been no difficulty in providing taxpayer relief for unconstitutional state taxes. *See, e.g., United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2888 (1991).

tice of the respondents.[11] As a result of the decision below, the Supreme Court of North Carolina cut off petitioners' existing remedy under the refund statute. This result conflicts with the decisions of this Court.

In *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), this Court held that the state court violated Due Process by judicially depriving the taxpayer of all remedies for challenging the validity of a tax. Specifically, the Court held that a taxpayer has a property interest in a remedy procedure, and this property interest is protected by the Due Process Clause:

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id., 281 U.S. at 682 (footnote and citations omitted).

The petitioners are in precisely the same situation as the taxpayer in *Brinkerhoff-Faris*. At the time they pursued the refund remedy under N.C.G.S. § 105.266.1, it was settled that refunds were available in the situation at

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[11] "Settled state practice" evinces state law. As this Court explained in *Nashville, Charlotte & St. L. Ry. Co. v. Browning*, 310 U.S. 362, 369 (1940):

> It would be a narrow conception of jurisprudence to confine the notion of "law" to what is found written on the statute books, and to disregard the gloss which life has written upon it. *Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. . . .* Deeply embedded traditional ways of carrying out state policy . . . are often . . . truer law than the dead words of the written text.

(Emphasis added). *See, e.g.*, "North Carolina Income Tax Forms and Instructions," Pet. at App. L A-112 ("Your amended tax returns must be filed within three years from the date your original return was due, or within six months of the date the tax was paid, whichever date is later.").

issue in this case. *See e.g., "North Carolina Income Tax Forms and Instructions,"* Pet. at App. L A-112, 115, 119. Therefore, they had a property interest in the remedy—refunds pursuant to § 105.266.1—and the decision of the court below extinguishing that right at a time when petitioners have no other remedy available violated Due Process. *Brinkerhoff-Faris,* 281 U.S. at 682. For this reason as well the Court should grant the petition and reverse the decision below.

CONCLUSION

Taxpayers throughout the country remain unsure of what they must do so preserve their rights to relief from unconstitutional state taxation. As one prominent commentator recently observed:

> *Harper* answered only some of the questions taxpayers are asking in their attempts to secure refunds of unconstitutional taxes. A complete understanding of what is required is still several court decisions away, including the issue of appropriate remedies presented by *Harper* itself.

Tatarowicz, *Harper v. Virginia Supports Retroactive Relief From Unconstitutional State Taxes,* 3 Journal of Multistate Taxation 244, 247 (Jan.-Feb. 1994). Absent definitive guidance from this Court proclaiming that the time for toleration of the states' chameleon-like tactics has come to an end, no citizen will be able to enforce his or her right to relief from unconstitutional state taxation.

Amici submit that a complete understanding of what is required can only be reached by decisive resolution of the issues presented herein. Absent such review the states will continue their efforts to annul the judgments of this Court. If these efforts go unchecked, "the constitution itself [will] become[] a solemn mockery." *Cooper v. Aaron,* 358 U.S. 1, 18 (1958) (citation omitted).

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of North Carolina should be granted and its decision reversed.

Respectfully submitted,

MICHAEL J. KATOR *
STEPHEN Z. CHERTKOF
KATOR, SCOTT & HELLER
1275 K Street, N.W.
Suite 950
Washington, D.C. 20005-4006
(202) 898-4800

ROBERT COSTELLO
GIVNEY, ANTHONY & FLAHERTY, P.C.
665 5th Avenue
Second Floor
New York, New York 10022
(212) 688-5151

MARK L. WEYMAN
ROBERTO VELEZ
ANDERSON, KILL, OLICK & OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-9363

JOHN J. PHELAN, III
JOHN J. PHELAN, III, P.C.
1414 Avenue of the Americas
New York, New York 10019
(212) 688-8088

KENTON C. GRANGER
RAYMOND L. DAHLBERT
NIEWALD, WALDECK & BROWN, P.C.
9401 Indian Creek Parkway
Corporate Woods, Building 40
Suite 550
Overland Park, KS 66225
(913) 451-1717

EUGENE O. DUFFY
O'NEIL, CANNON & HOLLMAN, S.C.
Suite 1400
111 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 276-5000

JOHN C. FRIEDEN
KEVIN M. FOWLER
FRIEDEN, HAYNES & FORBES
400 S.W. 8th, Suite 409
Topeka, KS 66603
(913) 232-7266

BRIAN A. LUSCHER
BONN, LUSCHER, PADDEN & WILKINS, CHARTERED
805 N. Second Street
Phoenix, AZ 85004
(602) 254-5557

* Counsel of Record

June 23, 1994

APPENDIX

The following is a complete list of organizations and individuals appearing as amicus curiae in connection with this brief:

MEMBERS OF THE MILITARY COALITION

THE RETIRED OFFICERS ASSOCIATION (TROA)

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

AIR FORCE ASSOCIATION (AFA)

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

AIR FORCE SERGEANTS ASSOCIATION (AFSA)

The Air Force Sergeants Associaiton was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES (AMSUS)

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Admnistration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

ASSOCIATION OF U.S. ARMY (AUSA)

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

COMMISSIONED OFFICERS ASSOCIATION OF THE U.S. PUBLIC HEALTH SERVICE, INC. (COA)

The Commissioned Officers Association of the U.S. Public Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to active duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE U.S. (EANGUS)

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

FLEET RESERVE ASSOCIATION (FRA)

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to represent its members on military personnel legislative matters before Congress.

MARINE CORPS LEAGUE (MCL)

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the

interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)

The National Association for Uniformed Services/ Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SWM membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. Membership is open to all present and former officers of the Army and Air National Guard, corporate and individual associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

NATIONAL MILITARY FAMILY ASSOCIATION (NMFA)

The National Military Family Association was founded in 1969 and has approximately 10,000 members. Membership is open to active duty, retired and reserve component members of the seven uniformed services and their family members. The association's mission is to serve as an advocate for uniformed service families and to educate and inform their concerning issues affecting their lives.

NAVAL ENLISTED RESERVE ASSOCIATION (NERA)

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

NAVAL RESERVE ASSOCIATION (NRA)

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

NAVY LEAGUE OF THE UNITED STATES (NLUS)

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NOCA)

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organization operating under Texas Corporate Charter. The Association was founded in 1960 and has more than 160,000 members. Its membership consists of active, reserve, retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES (ROA)

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,000 members. The purpose of the association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

THE MILITARY CHAPLAINS ASSOCIATION (MCA)

The Military Chaplains Association was founded in 1925 and chartered by the 81st Congress in 1950. It has approximately 1,300 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

THE RETIRED ENLISTED ASSOCIATION (TREA)

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The

mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

ARIZONA

The litigants are the Estate of John L. Bohn, Shirley Bohn, Donald and Mary Rutan, Carl Linton, Arthur Abbott, who are retired federal employees, their estates or personal representative, and, under the doctrine of virtual representation, the class of approximately 65,000 other retired federal employees, their estates and personal representatives. *Bohn v. Waddell,* No. 1 (A-TX, 94 —— —— (Ariz. Ct. App.) (Bohn II).

KANSAS *AMICI*

The petitioners in *Barker v. Kansas,* 112 S.Ct. 1619 (1992), *on remand,* Nos. 89-CV-666 and 89-CV-1100 (Dist Ct. Shawnee Cty., Kan., Div. IV), include:

KEYTON BARKER;
ROBERT W. CLAY;
BETTY J. CLAY;
ANTHONY E. CORCORAN;
LELAND W. KEISTER, JR.;
WILLIAM RICHARDS, SR.;
PATRICIA K. KEISTER;
LEONARD W. WILLIAMS;
RENATA O. KELLOGG;
WILLIAM J. LOBER, JR.;
MARJORIE E. LOBER;
ROGER J. OLSON;
NANCY W. OLSON;
ANDREW J. PEELE;
JOHN G. FOWLER;
OLLUN E. RICHARDS;
LONETA S. WILLIAMS;
EDWARD F. KELLOGG;
CLARENCE WOLF; and
FLORA B. WOLF,

for themselves individually and as designated class representatives on behalf of a certified class of approximately 14,000 federal military retirees (and joint taxpayer spouses where applicable) who were subject to Kansas income taxation of federal military retired pay during one or more years from 1984 through 1991.

NEW YORK *AMICI*

The appellants in *Duffy v. Wetzler*, 555 N.Y.S.2d 543 (N.Y.Sup.Ct. 1990), *aff'd as modified*, 174 A.D.2d 253, 579 N.Y.S.2d (N.Y. App. Div.), *appeal dism'd*, 79 N.Y. 2d 976, 583 N.Y.S.2d 190, 592 N.E.2d 798 (N.Y. 1992), *cert. granted, vacated, and remanded*, 113 S.Ct. 3027 (1993), *on remand*, Nos. 90-07800 and 91-02056 (N.Y.Sup.Ct.), include:

EUGENE H. DUFFY;
ALICE G. DUFFY;
FERNANDO S. MAURA;
JAMES SWEEZY;
ALICE SWEEZY;

on behalf of themselves and all others similarly situated.

VIRGINIA *AMICI*

The plaintiffs in *McClelland v. Payne*, No. 3:94CV211 (E.D.Va, Richmond Division), include:

JOHN F. MCCLELLAND;
THOMAS B. WORSLEY; and
CHRISTOPHER J. GIAIMO,

for themselves individually for all other similarly situated, as representatives on behalf of a putative class of approximately 185,000 similarly situated civilian and miliary annuitants of the federal government whose federal persons were subject of taxation by Virginia.

WISCONSIN *AMICI*

J. Gerard Hogan, on behalf of himself and as representative of the certified taxpayer class in *Wisconsin Department of Revenue v. Hogan*, No. 93-CV-2549 *et al.*, *pet. for rev. pend'g*, Cir. Ct. Dane Cty.

(6)

Supreme Court, U.S.
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No. 93-1882

In the
Supreme Court of the United States
October Term, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondent.

Petition for A Writ of Certiorari To The
Supreme Court of North Carolina

SUPPLEMENTAL BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Edwin M. Speas, Jr., Senior Deputy Attorney General
Thomas F. Moffitt*, Special Deputy Attorney General
Norma S. Harrell, Special Deputy Attorney General
Marilyn R. Mudge, Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629
(919)733-3786

*Counsel of Record

No. 93-1882

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NORMAN W. SWANSON, *et al.*,
Class A Petitioners,

and

CHARLES L. BERRY, *et al.*,
Class B Petitioners,

V.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

Petition for A Writ of Certiorari to the Supreme Court of North Carolina

---

SUPPLEMENTAL BRIEF IN OPPOSITION

SUPPLEMENT TO ARGUMENT I (2) OF THE BRIEF IN OPPOSITION

On June 23, 1994, the Respondents submitted their brief in opposition to the petition for writ of *certiorari*. Included in the brief was a response to the argument that the North Carolina Supreme Court erred

by failing to give preclusive effect to a jurisdictional finding by United States District Court Judge Malcolm J. Howard in 1990 that North Carolina's tax refund statute for recovery of unlawful taxes, N.C. GEN. STAT. § 105-267, was not plain, speedy and efficient for purposes of the Tax Injunction Act.[1] Petitioners contended that the jurisdictional finding should have been given preclusive effect on the issue of whether N.C. GEN. STAT. § 105-267 violated their due process rights. Judge Howard expressly rejected this argument in his May 1994 order granting summary judgment to the Respondents in Petitioners' federal litigation.[2] Petitioners moved for reconsideration.[3] The motion was pending when the brief in opposition was filed.

On June 28, 1994, Judge Howard denied the Petitioners' motion for reconsideration. A copy of his order is set forth in the appendix to this supplemental brief. Of particular significance is Judge Howard's

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[1] *Brief in Opposition*, Argument I (2) at 23-24 in response to *Petition for Writ of Certiorari*, Argument 2 at 22-25.

[2] The text of that portion of Judge Howard's May 1994 order in *Swanson, et al. v. Faulkner*, EDNC No. 89-282-CIV-5-H (formerly *Swanson v. Powers*) is set forth in *Petitioners' Appendix H* at A82-A86.

[3] *See* footnote 15 on page 9 of the Petition for reference to Petitioners' motion for reconsideration.

decision as to the preclusive effect he ascribes to the jurisdictional finding he made in his 1990 order:

> The North Carolina Supreme Court has already decided that N.C. GEN. STAT. § 105-267 gives plaintiffs due process, both on its face and as applied . . . Plaintiffs, however, contend that this court's findings that § 105-267 is not plain, speedy and efficient was a finding that the statute violates the due process clause. *The court declines to adopt plaintiffs' reasoning.* The due process clause and the Tax Injunction Act are different devices with different standards. *Even if they were not, and this court had unwittingly held that § 105-267 violated the due process clause, this court's decision was non-final.* Plaintiffs recognized this fact when they moved for entry of final judgment. . . .

Judge Howard's June 28, 1994 Order, at 2, Appendix at 2a. (Emphasis added.) Thus, Petitioners' argument has been definitively rejected by the very judge who made the finding they contend should be given preclusive effect. It should likewise be rejected by this Court.

CONCLUSION

Respondents reiterate that the petition for writ of *Certiorari* should be denied.

Respectfully submitted,

MICHAEL F. EASLEY
Attorney General

Edwin M. Speas, Jr.
Senior Deputy Attorney General

Thomas F. Moffitt*
Special Deputy Attorney General

Norma S. Harrell
Special Deputy Attorney General

Marilyn R. Mudge
Assistant Attorney General

N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-3786

July 19, 1994

*Counsel of Record

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

NO. 89-282-CIV-5-H

NORMAN W. SWANSON, et al.,	)	
	)	
Class A Plaintiffs,	)	
	)	
CHARLES L. BERRY, et al.,	)	
	)	**ORDER**
Class B Plaintiffs,	)	[Filed: June 28, 1994]
	)	
v.	)	
	)	
JANICE H. FAULKNER, et al.,	)	
	)	
Defendants.	)	

This matter is before the court on plaintiffs' motion for reconsideration. In an order filed May 6, 1994, this court granted defendants' motion for summary judgment and entered final judgment in favor of the defendants. Defendants have filed a memorandum in opposition to plaintiff's motion, and this matter is ripe for disposition.

Plaintiffs move for reconsideration on three grounds: that they need not satisfy state procedural law in order to maintain a suit in federal court for the deprivation of a federal right pursuant to 42 U.S.C. § 1983; that this court has already held that the state statute did not satisfy due process; and that this court has the authority to require the creation of a nondiscriminatory taxing scheme.

The remedies for the collection of an unconstitutional tax are prospective injunctive relief, a pre- or post-deprivation remedy that satisfies the requirements of the due process clause, and meaningful backward-looking relief. McKesson v. Div. of Alcoholic Beverages & Tobacco, 110 S.Ct. 2238 (1990). Accordingly, the state post-deprivation remedy, N.C. Gen. Stat. § 105-267, is not an administrative remedy or hurdle. It is, in fact, an integral part of the remedy to which plaintiffs are entitled. Federal law requires that when a tax is collected, there be a pre- or post-deprivation remedy for the tax that satisfies the due process clause. In other words, the state law which plaintiffs claim is an administrative requirement is, in fact, part of the remedy afforded to them by the federal constitution.

The North Carolina Supreme Court has already decided that N.C. Gen. Stat. § 105-267 gives plaintiffs due process, both on its face and as applied. This court is bound by that determination. Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1986). Plaintiffs, however, contend that this court's finding that § 105-267 is not plain, speedy and efficient was a finding that the statute violates the due process clause. The court declines to adopt plaintiffs' reasoning. The due process clause and the Tax Injunction Act are different devices with different standards. Even if they were not, and this court had unwittingly held that § 105-267 violated the due process clause, this court's decision was non-final. Plaintiffs recognized this fact when they moved for the entry of final judgment. The state court judgment was, however, final, and therefore binding on this court.

Finally, plaintiffs argue that the court has full authority to create in hindsight a nondiscriminatory taxing scheme. The meaningful backward-looking relief discussed in McKesson was a monetary refund. The Eleventh Amend-

ment bars suits for money damages, including refunds, against a state in a federal district court. Edelman v. Jordan, 415 U.S. 651 (1974). Consequently, plaintiffs request declaratory and injunctive relief in their motion for reconsideration. However, the allegedly unconstitutional taxing scheme has been repealed. There is no longer any practice to enjoin in this matter. Plaintiffs have received all the remedy a federal court exercising original jurisdiction is able to give to them.

For the foregoing reason, plaintiffs' motion for reconsideration is DENIED.

This the 27th day of June, 1994.

/s/ Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

I certify the foregoing to be a true and correct copy of the original. David W. Daniel, Clerk United States District Court, Eastern District of North Carolina

/s/ Cherlyn Wells
Deputy Clerk

At Greenville, NC
#16

Supreme Court, U.S.
FILED
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No. 93-1882

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Class A Petitioners, and

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Class B Petitioners,

v.

THE STATE OF NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of North Carolina

PETITIONERS' REPLY BRIEF

Charles H. Taylor
4295 Shattalon Drive
Winston-Salem, NC 27106
(910) 924-6064

G. Eugene Boyce *
William C. Raper
Keith W. Vaughan
Robert E. Fields, III
Lawrence Pierce Egerton
Kimberly C. Stevens

Womble Carlyle Sandridge & Rice
A Professional Limited Liability Company
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100
Attorneys for Petitioners

*Counsel of Record
August 19, 1994

LANTAGNE DUPLICATING SERVICES
901 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

34 pp

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Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of North Carolina

PETITIONERS' REPLY BRIEF

Respondents do not contest that Petitioners raise issues of substantial public importance.[1] The decision below affects over 143,000 federal retirees and employees in North Carolina alone, more than 10,267 of whom have died in the five years since *Davis*. (App. S). The extent to which this Court will accommodate state

[1]Twenty-four Attorney Generals, as *Amicus Curiae* in *Reich v. Collins*, agree that review there will not answer the remedial relief questions raised here. *See Amicus* Brief filed in Support of Respondents in *Reich v. Collins*, No. 93-908, at 28: "Even if the Court concludes [in *Reich*] that Georgia's pre-deprivation process is inadequate to satisfy federal due process, whether either federal law or state law mandates remedial relief in [*Reich*], and what form any remedial relief might take are issues for another day. Those issues are not presented in [*Reich*] and will not be resolved by the decision [there]." *See* Petition ("Pet."), pp. 3, 11.

taxation interests which collide with federal due process principles is squarely presented. The decision below also conflicts with decisions of other state courts of last resort[2] as well as *McKesson v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993), *Mathews v. Eldridge*, 424 U.S. 319 (1976), *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930), and *Felder v. Casey*, 487 U.S. 131 (1988).

This case presents many unaddressed issues about specific aspects of the post-deprivation relief required by due process, including: (1) when a state provides *no* pre-deprivation remedy, can it collect a tax under duress and then deny, for no purpose, all opportunity to challenge the tax for at least ninety days; (2) did Respondents' application of Section 267 to Petitioners, including all of the Department's misstatements and confusion, deprive Petitioners of a meaningful opportunity to pursue North Carolina's onerous refund remedy; (3) can a state tell taxpayers they have three years to seek refunds and then limit them to thirty days[3]; (4)

---

[2]Compare *Swanson III* with *Strelecki v. Oklahoma Tax Comm'n*, 872 P.2d 910 (Okla. 1993), *on reh'g*, 1994 WL 102224 (Okla. 1994); *Hagge v. Iowa Dept. of Revenue and Finance*, 504 N.W.2d 448 (Iowa 1993); *Brumley v. Utah State Tax Comm'n*, 868 P.2d 796 (Utah 1993, amended January 13, 1994); *Marx v. Broom*, 632 So.2d 1315 (Miss. 1994); *Hackman v. Dir. of Revenue*, 771 S.W.2d 77 (Mo. 1989 (en banc)), *cert. denied*, 493 U.S. 1019 (1990); *Kuhn v. Colorado*, 817 P.2d 101 (Colo. 1991), *cert. dismissed*, 112 S. Ct. 1925 (1992); *Cambridge State Bank v. James*, 514 N.W.2d 565 (Minn. 1994); *In re Hawaiian Flour Mills, Inc.*, 868 P.2d 419 (Hawaii 1994); *Nevada v. Scotsman Mfg. Co.*, 849 P.2d 317 (Nev. 1993); *Service Oil v. North Dakota*, 479 N.W.2d 815 (N.D. 1992).

[3]Respondents' reliance on *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 871 (1992), is misplaced. First, *Powers* is inapposite because it only addressed qualified immunity and not the merits of Petitioners' due process claims. Second, the Fourth Circuit's statements, in *dicta*, about the tax bulletins are incomplete: while the bulletins stated they "do not cover all phases of the law," nowhere did they state that they were *wrong*. Also, the court did not address the misleading statements contained in the instructions sent to every taxpayer with no such limiting language, and the erroneous advice given directly by Department officials to Petitioners. *See* Pet., pp. 4-5.

can a state procedurally bar refund proceedings under the guise of "fiscal planning" and then do no such planning; (5) can a state reject a class demand using unannounced form and content requirements; (6) can a state, after a timely-filed class demand, block a class action by judicially requiring individual demands when the time for making the demands has expired; and (7) can a state avoid retroactive application of *Davis* by requiring, within thirty days after payment, futile refund demands for tax years before *Davis*?

Since twenty two of the twenty three states affected by *Davis* have either settled or are settling, this case may provide the last opportunity to convert the *Davis* aftermath into definitive guidance on the constitutional parameters for post-deprivation relief mandated by *Harper* and *McKesson*.[4] With all of the resources invested in struggling with *Davis*, guidance is critical to avoid wasteful repeat of this struggle. Further, absent review, North Carolina may become the only state in the union whose retirees receive neither meaningful relief for admittedly unconstitutional taxation nor considered answers to the serious questions raised about their treatment both before and after *Davis*.

With no pre-deprivation remedy and a mere thirty-day demand window, North Carolina has the most restrictive refund scheme in the nation. Given the concerns with pre-deprivation relief expressed by Attorney Generals for twenty-four states (fn. 1, *supra*), approval of North Carolina's scheme, particularly as applied to Petitioners, will almost certainly make it the model, sound the death knell for pre-deprivation remedies, and relegate taxpayers to the variable and potentially arbitrary generosity of state legislatures to obtain refunds of illegally-collected taxes. *McKesson* squarely rejects the idea that meaningful relief for unconstitutional taxation is a matter of state legislative and judicial grace; such relief is a constitutionally protected right.

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[4]Amended Appendix CC updates the status of *Davis*-related litigation.

In contrast to these substantial issues, Respondents oppose the instant petition by claiming that their actions were "clearly lawful," and, therefore, this Court need not intervene. Yet, the majority opinion below ignores Petitioners' questions about what happened to them, dismisses without discussion the dissent's serious constitutional objections, and provides little or no illumination for the future. Justice and the public deserve better. Review should, therefore, be granted regardless of the merits of Respondents' claim that their actions were lawful.[5]

1. Respondents' reliance on *McKesson* is misplaced. This Court, in *McKesson*, reaffirmed that "[t]o satisfy the requirements of the Due Process Clause . . . in [a] refund action the State must provide taxpayers with, *not only a fair opportunity to challenge . . . the legal validity of their tax obligation*, but also a `clear and certain remedy,' . . . to ensure that the opportunity to contest the tax is a meaningful one." 110 S. Ct. at 2251 (emphasis added). In noting that "[t]he fundamental requirement of due process is the opportunity to be heard `at a meaningful time and in a meaningful manner'" *McKesson* did not alter, but rather reinforced, this fundamental tenet of due process. *Id.* at 2251 n.22 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

North Carolina's absence of a pre-deprivation remedy coupled with Section 267's futile demand and wait requirement unnecessarily postpones a taxpayer's opportunity to be heard at a meaningful time and in a meaningful manner. The result: taxpayer challenges to unconstitutional and illegal taxes are chilled far beyond the extent necessary to protect state taxation interests. *See Bell v. Burson*, 402 U.S. 535, 542-43 (1971) ("The hearing required by the Due Process Clause must be `meaningful,' . . . and appropriate to the nature of the case'") (citations omitted); *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975) ("[T]here are recurring

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[5]Respondents also claim that Petitioners' statement of the case is biased and misleading. Petitioners rest upon the quality and quantity of their citations to the record and Respondents' failure to identify even one factual error.

situations in which prior notice and hearing cannot be insisted upon. . . . In such cases, the . . . hearing should follow as soon as practicable"); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975) (citing absence of an early hearing following garnishment as ground for striking down garnishment statute). Further, Section 267 *as applied* ultimately deprived Petitioners the opportunity to be heard *at all*. Section 267 thus unlawfully barred Petitioners' right to a hearing in the first instance and a clear and certain remedy in the second.[6]

Respondents ignore this absence of a meaningful opportunity to be heard and confuse the issues thus presented by relying upon *dicta* from *McKesson*[7] which merely responded to Florida's claim that the financial impact of unanticipated tax refunds was sufficient to deny meaningful backward-looking relief. In rejecting Florida's claim, this Court noted that various procedural mechanisms available to states adequately allow fiscal planning if states choose

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[6]To afford a "clear and certain" remedy, Respondents must refund the tax, tax the state retirees retroactively, or provide some combination which creates, in hindsight, a non-discriminatory scheme. *Harper*, 113 S. Ct. at 2519-20.

[7]"The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some timely notice of complaint . . . [or] enforce relatively short statutes of limitations applicable to such action." *McKesson*, 496 U.S. at 45. The "protest requirements," "timely notice provisions" and "short statutes of limitation" mentioned by Justice Brennan should be viewed in light of his earlier opinion in *Felder v. Casey*, 487 U.S. 131, 153 (1988). What a state *can* do is require a taxpayer to protest at the time a tax is paid to enable fiscal planning by the state. What a state *can* do is enforce "relatively short" statutes of limitation. What a state *cannot* do, and what North Carolina has done, is condition the right to recovery "upon compliance with a rule designed to minimize governmental liability, and . . . [direct] injured persons to seek redress in the first instance from the very [individuals or entities who violated the victims' constitutional rights]." *Id.* What North Carolina *cannot* do is impose such onerous procedural requirements without providing an adequate post-deprivation hearing.

to use them.[8] The Court did not hold that states could use such procedural mechanisms to needlessly delay the opportunity to be heard, use such requirements for no purpose or for purposes other than fiscal planning, mislead taxpayers about the existence of such provisions, or discourage refund claims by delaying a meaningful hearing through futile procedural hurdles.

To the contrary, the watch words of *McKesson* are "meaningful time," "meaningful manner," "fair opportunity," "clear and certain," "backward-looking *relief*," "non-discriminatory scheme" and "preventing any permanent unlawful deprivation." North Carolina's scheme, as interpreted, hardly survives these standards. *McKesson*, therefore, provides Respondents no refuge. Respondents' misleading and confused application of Section 267 compounded the problem by turning Section 267 into a "trap" which deprived Petitioners of both meaningful relief and a meaningful hearing. As a result and contrary to the holding in *McKesson*, due process was trampled.

2. North Carolina's refund of a fraction of the taxes wrongfully collected after *Davis* and a subsequent tax credit do not demonstrate that Section 267 is a meaningful remedy. Respondents dispute that Section 267 is futile because a few (less than ten percent) of the affected taxpayers received refunds of 1988 tax year payments. (Br. in Opp., p.6). Yet, the North Carolina Supreme Court has unequivocally held that "questions of constitutionality are for the courts." *Coca-Cola*, 238 S.E.2d at 783.

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[8]Respondents principally contend that Section 267 is a "statute of limitation" or a "protest requirement" approved by *McKesson*. It is neither. A statute of limitation extinguishes the right to bring suit after a defined period of time. *Black's Law Dictionary*, p. 927 (6th ed. 1990). Section 267 does not extinguish any right to bring suit. No right exists until after a refund demand and a futile wait. Likewise, the demand requirement of Section 267 is not a "protest" requirement. Section 267 had a protest requirement until 1957, when the legislature eliminated it and enacted N.C. Gen. Stat. § 105-266.1 ("Section 266.1") as an alternative remedy. *See* 1957 N.C. Sess. Laws, Section 10, Chapter 1340 (App. HH, pp. 303-305). *See also Kirkpatrick v. Currie*, 108 S.E.2d 209 (N.C. 1959); *cf. Coca-Cola v. Coble*, 238 S.E.2d 780 (N.C. 1977).

Likewise, the North Carolina Attorney General has concluded that *none* of the North Carolina statutes which empower the Secretary to give refunds authorize refund of "unlawful" taxes. (App. O). Furthermore, the evidence is uncontroverted that before *Davis* any demand for refund by Petitioners or any one of them would have been denied. (Pet., p. 6 n.8, p. 19 n.32). Therefore, in context, Respondents are arguing that Section 267's demand requirement was not futile because the Secretary made refunds to a few members of Class A, but no members of Class B, even though North Carolina law provided no basis for her to do so.

This decision by the Secretary to benefit a few taxpayers by ignoring the limits upon her authority does not demonstrate that the demand requirement of Section 267 was anything other than futile and *certainly* does not demonstrate that Section 267 provides a "clear and certain" remedy or a meaningful opportunity to be heard "as soon as practicable." To the contrary, such an isolated and largely arbitrary decision to benefit a few, while the remainder are provided no relief, is the antithesis of the even-handed treatment which lies at the heart of this nation's steadfast commitment to due process for all.

Accordingly, Respondents' claims should be recognized for what they are: not only a desperate attempt to justify the inadequate relief provided to Class A Petitioners for tax year 1988, but also utterly unresponsive to Petitioners' showing that neither meaningful opportunity to be heard nor "clear and certain" relief was available to Class A for tax years 1985 through 1987 and Class B for tax years 1986 through 1989.[9] In any event, the majority opinion below's failure to even discuss this issue further supports review here.

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[9]Furthermore, the tax credit was limited to 1988 taxes Respondents knew were illegal when collected in April of 1989 (App. O), did not benefit any member of Class B, provided no relief to taxpayers who were not in a position to use the credit, and included no interest. App. HH, p. 300.

3. Class B Petitioners suffered unlawful discrimination violating 4 U.S.C. § 111 and intergovernmental tax immunity. Since no member of Class B received refunds following *Davis*, Respondents seek to fill this gap in their case by claiming the taxation of Class B did not violate 4 U.S.C. § 111 ("Section 111"). From 1979 through 1989, North Carolina provided a $1,500 income tax exemption for National Guard pay. N.C. Gen. Stat. § 105-134.6(b)(4). No equivalent exemption was provided to Class B Petitioners. Taxes were imposed and collected from Petitioners even after *Davis*. On July 20, 1990, the state legislature enacted "*An Act to Conform the Laws of North Carolina to the Requirements of Certain Federal Laws and Constitutional Principles*," repealing the discriminatory legislation. (App. HH, p. 306). Although the legislature recognized the violation of federal law, the North Carolina Attorney General now contends that the statute did *not* offend that law.

Relying solely upon the language of Section 111 and disregarding the constitutional doctrine of intergovernmental tax immunity, Respondents claim that because state guardsmen were compensated by both the state and federal governments, there was no discrimination on a "source of compensation" basis. Respondents do not, and cannot, argue that the sources of compensation of Class B Petitioners and state guardsmen are *identical*; state guardsmen, unlike their federal counterparts, are compensated from the state treasury.[10] This difference, no matter how small, in the source of pay is enough to classify National Guardsmen as *state* rather than *federal* employees -- *the only* "difference" resulting in discriminatory taxation. *See Perpich v. Dept. of Defense*, 496 U.S. 334, 345 (1990) ("unless and until ordered to active duty in the Army [in the case of a national

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[10]North Carolina provides compensation to guardsmen in the form of pay (N.C. Gen. Stat. §§ 127A-105-109); disability income (N.C. Gen. Stat. § 127A-108); pensions (N.C. Gen. Stat. § 127A-40); decorations and awards (N.C. Gen. Stat. §§ 127A-42-44); and tuition assistance (N.C. Gen. Stat. §§ 127A-192-194).

emergency], they [National Guard personnel] retained their status as members of a separate state Guard unit").

This Court has expressly held that Section 111 may not be construed without reference to the intergovernmental tax immunity doctrine. *Davis*, 489 U.S. at 816; *see also Barker v. Kansas*, 112 S. Ct. 1619, 1622 (1992). The dispositive inquiry is "*whether the inconsistent tax treatment is directly related to, and justified by, 'significant differences between the two classes.'*" *Barker*, 112 S. Ct. at 1622 (citing *Davis*, 489 U.S. at 816) (emphasis added).

Respondents only point to two alleged "significant differences" to "justify" the Class B discrimination. First, even though state guardsmen are paid from the state treasury when they perform state services (App. HH, pp. 291-293), Respondents claim the tax exemption compensated them for being available and for the services. Next, Respondents argue the tax exemption was an incentive to recruit and retain qualified members. Both are claims that the state should be allowed to use a tax exemption as additional compensation to persons providing services to the state or being recruited by the state. In *Davis*, this Court expressly rejected Michigan's similar argument, stating "[t]he State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." 489 U.S. at 816.

Respondents have not demonstrated "significant differences" between Class B Petitioners and state guardsmen. Therefore, this clear discrimination was unlawful.[11] Review will provide this Court an opportunity to put this issue to rest.

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[11]Respondents raised other issues not worthy of discussion here, but which also lack merit. For example, Respondents submitted a supplemental brief blurring the distinction between a final *judgment on the merits* and a *final order* entitled to preclusive effect under federal law. Also, Respondents improperly focus on whether the federal court properly gave preclusive effect to *Swanson III* (an issue Petitioners are appealing in the federal case). In contrast, the issue here is the preclusive effect of the earlier federal order. (Pet., pp. 22-25).

CONCLUSION

Since this Petition was filed, every state *except* North Carolina has now provided or is attempting to provide relief in the *Davis*-related litigation. Absent review by this Court, North Carolina may be the only state to violate *Davis* and *Harper* with impunity. Resolution by this Court of the issues presented is necessary not only to ensure that Petitioners are afforded due relief equal to that granted similarly situated citizens in twenty-two other states, but also to create future incentive for states to enact constitutionally sound tax laws, to prevent post-deprivation remedy issues from repeatedly arising, and to once again establish that states may not use procedural gamesmanship to subvert the Supremacy Clause. For the reasons contained in the Petition and herein, Petitioners respectfully request that a writ of *certiorari* issue to the Supreme Court of North Carolina.

This the 19th day of August, 1994.

Respectfully submitted,

Charles H. Taylor
4295 Shattalon Drive
Winston-Salem, NC 27106
(910) 924-6064

G. Eugene Boyce*
William C. Raper
Keith W. Vaughan
Robert E. Fields, III
Lawrence Pierce Egerton
Kimberly C. Stevens

Womble Carlyle Sandridge & Rice
A Professional Limited Liability Company
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100

*Counsel of Record
August 19, 1994

Attorneys for Petitioners

AMENDED APPENDIX CC

Refunds Pre-Harper	Refunds or Settlement Negotiations Post-Harper		No Refunds No Settlement
Arizona	Alabama	Montana	North Carolina
Michigan[1]	Arkansas	New Mexico	
Missouri	Colorado	New York[5]	
	Georgia[2]	Oklahoma	
	Iowa	Oregon	
	Kansas	South Carolina[6]	
	Kentucky[3]	Utah	
	Louisiana	Virginia[6]	
	Minnesota[4]	West Virginia	
	Mississippi	Wisconsin[5]	

1 Although the state paid refunds to Davis after the Supreme Court ruling, the state continued to litigate retroactive relief in *Fonger*. State later paid refunds in light of *Harper* to those who timely complied with the refund statute.

2 Georgia is struggling toward settlement.

3 Kentucky has conceded that retirees were entitled to refunds. State is currently litigating procedural (two year vs. four year statute of limitations), rather than constitutional, questions.

4 Minnesota is not a federal retiree case, but one remanded "in light of Harper."

5 Wisconsin and New York have made settlement offers. Certain areas of the settlements have not been approved and are currently being debated.

6 Virginia and South Carolina recently approved settlements through the state legislature and Governors' offices.

APPENDIX HH

Relevant North Carolina General Statutes and Session Laws

§ 127A-40. Pensions for the members of the North Carolina national guard.

(a) Every member and former member of the North Carolina national guard who meets the requirements hereinafter set forth shall receive, commencing at age 60, a pension of fifty dollars ($50.00) per month for 20 years' creditable military service with an additional five dollars ($5.00) per month for each additional year of such service; provided, however, that the total pension shall not exceed one hundred dollars ($100.00) per month. The requirements for such pension are that each member shall:

(1) Have served and qualified for at least 20 years' creditable military service, including national guard, reserve and active duty, under the same requirement specified for entitlement to retired pay for nonregular service under Chapter 67, Title 10, United States Code.

(2) Have at least 15 years of the aforementioned service as a member of the North Carolina national guard.

(3) Have received an honorable discharge from the North Carolina national guard.

(b) Payment to a retired member of the North Carolina national guard under the provisions of this section will cease at the death of the individual and no payment will be made to beneficiaries or to the decedent's estate.

(c) No individual receiving retired pay as a result of length of service, age or physical disability retirement from any of

the regular components of the armed forces of the United States will be eligible for benefits under this section.

(d) Nothing contained in this section shall preclude or in any way affect the benefits that an individual may be entitled to from State, federal or private retirement systems.

(e) Benefits paid under the provisions of this section shall be exempt from the North Carolina income tax.

(f) The Secretary of Crime Control and Public Safety shall determine the eligibility of guard members for the benefits herein provided and shall certify those eligible to the State Treasurer. In addition, the Department of Crime Control and Public Safety shall, on and after July 1, 1983, provide the Department of State Treasurer with an annual census population, by age and the number of years of creditable service, for all former members of the National Guard in receipt of a pension as well as for all active members of the National Guard who are not in receipt of a pension and who have seven and more years or creditable service. The Department of Crime Control and Public Safety shall also provide the State Treasurer a census population of all former members of the National Guard who are not in receipt of a pension and who have 15 and more years of creditable service. The Department of State Treasurer shall make pension payments to those persons certified from the North Carolina National Guard Pension Fund, which shall include general fund appropriations made to and transferred from the Department of Crime Control and Public Safety. The Department of State Treasurer shall have performed an annual actuarial valuation of the fund and shall have the financial responsibility for maintaining the fund on a generally accepted actuarial basis. The Department of Crime Control and Public Safety shall provide the Department of State Treasurer with whatever assistance is required by the State Treasurer in carrying out his financial responsibilities.

(g) The provisions of this section shall apply to any member or former member of the North Carolina national guard

who is qualified for the above retirements with eligibility of such person commencing at age 60 or July 1, 1974, whichever is the later date.

(h) If, for any reason, the North Carolina National Guard Pension Fund shall be insufficient to pay in full any pension benefits, or other charges, then all benefits or payments shall be reduced pro rata, for as long as the deficiency in amount exists. No claim shall accrue with respect to any amount by which a pension or benefit payment shall have been reduced.

(i) Pensions for members of the North Carolina National Guard shall be subject to future legislative change or revision. (1973, c. 625, s.1; 1241, ss. 1-3; 1975, c.604, s.2; 1977, c.70, s. 2; 1979, c. 870; 1983, c. 761, ss. 250, 251.)

§ 127A-42. Distinguished Service Medal by Governor of North Carolina.

There is hereby created the North Carolina Distinguished Service Medal which shall be of appropriate design, and a ribbon, together with a rosette or other device to be worn in lieu thereof. This medal and appurtenances thereto shall be of a design approved by the Governor. Upon the recommendation of the Secretary of Crime Control and Public Safety and a board consisting of the Adjutant General and all other general officers and officers assigned to authorized general-officer-grade vacancies, North Carolina national guard, the governor is authorized to present such medal to any member or former member of the armed forces discharged under honorable conditions, who has distinguished himself by exceptionally meritorious conduct in the performance of outstanding service to the North Carolina national guard. The Governor, on his own authority, may award such medal to the Secretary of Crime Control and Public Safety, the Adjutant General, or any other active or inactive general officer of the armed forces, who has distinguished himself by especially meritorious conduct in the performance of his duties. (1955, c.

255, s. 2; 1963, c. 1016, s. 2; 1973, c. 1124; 1975, c. 604, s. 2; 1977, c. 230, s. 1)

§ 127A-43. North Carolina National Guard Meritorious Service Medal.

There is hereby created the North Carolina National Guard Meritorious Service Medal which shall be of appropriate design, and a ribbon, together with a rosette or other device to be work in lieu thereof. This medal and appurtenances thereto shall be of a design approved by the Governor or his designated representative. The Governor or his designated representative is authorized to award this medal upon the recommendation of the Secretary of Crime Control and Public Safety in consultation with the Adjutant General and a board of officers appointed by the Adjutant General. Any member or former member of the armed forces discharged under honorable conditions, who has distinguished himself by heroism, meritorious achievement, or meritorious service to the North Carolina national guard, is eligible for this award. The Governor, on his own authority, may award such medal to the Secretary of Crime Control and Public Safety, the Adjutant General or any other active or inactive general officer of the armed forces who has distinguished himself by heroism, meritorious achievement, or meritorious service to the North Carolina national guard. The required heroism, achievement, or service, while of a lesser degree than that required for awarding of the North Carolina Distinguished Service Medal, must nevertheless be accomplished with distinction. (1973, c. 966, s. 1; 1975, c. 604, s. 2; 1977, c. 230, s. 2)

§ 127A-44. North Carolina National Guard Commendation Medal.

There is hereby created the North Carolina National Guard Commendation Medal which shall be of appropriate design, and a ribbon, together with a rosette or other device to be worn in lieu thereof. This medal and appurtenances thereto shall be of a design approved by the Governor or his designated representative. The

Adjutant General of North Carolina or his designated representative, who shall not be below the grade of general officer, is authorized to award this medal. Any member or former member of the armed forces discharged under honorable conditions, who distinguishes himself by his example or the performance of a specific act in behalf of the North Carolina national guard, is eligible for this award. (1975, c. 604, s. 2; 1977, c. 230, s. 3)

§ 127A-105. Rations and pay on State service.

The militia of the State, both officers and enlisted personnel, when called into the service of the State by the Governor shall receive the same pay as when called or ordered into the service of the United States, and shall be rationed or paid the equivalent thereof, provided that no officer or enlisted personnel shall receive less than 12 times the minimum hourly wage per day as provided for in G.S. 95-87. (1813, c. 850, s. 5, P.R.; R.C., c. 70, s. 84; Code, s. 3248; Rev., s. 4856; 1907, c. 316; 1917, c. 200, s. 50; C.S., s. 6864; 1935, c. 452; 1959, c. 218, s. 17; 1975, c. 604, s. 2)

§ 127A-106. Paid by the State.

When the militia or any portion thereof shall be ordered by the Governor into State service, the pay, subsistence, transportation and other necessary expenses incident thereto shall be paid by the State Treasurer, upon the approval of the Governor and warrant of the auditor. (1917, c. 200, s. 52; C.S., s. 6866; 1975, c. 604, s. 2)

§ 127A-107. Rate of pay for other service.

The Governor may, whenever the public service requires it, order upon special or regular duty any officer or enlisted member of the national guard or naval militia, and the expenses and compensation therefor of such officer and enlisted member shall be paid out of the appropriations made to the Department of

Crime Control and Public Safety. Such officers and enlisted members shall receive the same rate of pay as officers and enlisted members of the same grade and like service of the regular service, provided that no such offer or enlisted member shall receive less than 12 times the minimum hourly wage per day as provided for in G.S. 95-87. Officers and enlisted members when on duty in connection with examining boards, efficiency boards, advisory boards, courts of inquiry or similar duty shall be allowed per diem and subsistence prescribed for lawful State boards and commissions generally for such duty. Officers and enlisted members serving on general or special courts-martial shall receive the base pay of their rank. No staff officer or enlisted member who receives a salary from the State as such shall be entitled to any additional compensation other than actual and necessary expenses incurred while traveling upon orders issued by the proper authority. (1917, c. 200, s.51; C.S., s. 6865; 1935, c. 451; 1949, c. 1130, s. 4; 1959, c. 218, s. 18; 1963, c. 1019, s. 1; 1969, c. 986; 1971, c. 204; 1973, c. 620, s. 9; 1975, c. 604, s. 2; 1977, c. 70, s. 2.)

§ 127A-108. Pay and care of soldiers, airmen and sailors disabled in service.

A member of the national guard, the State defense militia, or the naval militia who without fault or negligence on his part is disabled through illness, injury, or disease contracted or incurred while on duty or by reason of duty in the service of the State or while reasonably proceeding to or returning from such duty shall receive the actual necessary expenses for care and medicine and medical attention at the expense of the State and if such shall temporarily incapacitate him from pursing his usual business or occupation he shall receive during such incapacity the pay and allowances are as provided for the same grad and rating in like circumstances in the active armed forces of the United States. If such member is permanently disabled, he shall receive the pensions and rewards that persons under similar circumstances in the military service of the United States receive from the United States. In case any such member shall dies as a result of such injury, illness or disease within one year after it has been incurred

or contracted, the surviving spouse, minor children, or dependent parents of the member shall receive such pension and rewards as persons under similar circumstances received from the United States.

The cost incurred by reason of this section shall be paid out of the Contingency and Emergency Fund, or such other fund as may be designated by law.

The Adjutant General, with the approval of the Governor, shall make and publish such regulations pursuant to this section as may be necessary for its implementation. Before the name of any person is placed on the disability or pension rolls of the State under this section, proof shall be made in accordance with such regulations that the applicant is entitled to such care, pension, or reward.

Nothing herein shall in any way limit or condition any other payment to such member as by law may be allowed: Provided, however, any payments made under the provisions of Chapter 97 of the General Statutes or under federal statutes as now or hereafter amended shall be deducted from the payments made under this section. (1917, c. 200, s. 54; C.S., s. 6868; 1959, c. 218, s. 19; c. 763; 1965, c. 1058; 1975, c. 604, s. 2.)

§ 127A-109. Pay of general and field officers.

General and field officers when away from their home stations visiting the organizations of their commands, for inspection and instruction under orders from proper authority, shall receive actual necessary expenses and the pay of their rank. (1917, c. 200, s. 53; C.S., s. 6867; 1975, c. 604, s. 2.)

§ 127A-192. Definitions.

(a) "Business and Trade School". - Any school within the State of North Carolina which is licensed by the State Board of

Education and listed by that Board as an approved private business school or an approved private trade school.

(b) "Private Educational Institutions". - Any junior college, senior college or university which is operated and governed by private interests not under the control of the federal, State or any local government, which is located within and licensed by the State of North Carolina, which does not operate for profit, whose curriculum is primarily directed toward the awarding of associate, baccalaureate or graduate degrees, which agrees to the applicable administration and funding provisions of this Article.

(c) "Secretary". - The Secretary of Crime Control and Public Safety or his designee.

(d) "State Educational Institutions". - Any of the constituent institutions of the University of North Carolina, or any community college or technical institute operated under the provision of Chapter 115A or Article 3 of Chapter 116 of the General Statutes of North Carolina.

(e) "Academic Year". - Any period of 365 days beginning with the first day of enrollment for a course of instruction. (1975, c. 917, s. 4; 1977, c. 70, s. 2; c. 228, s. 1.)

§ 127A-193. Benefit.

The benefit provided under this Article shall consist of a monetary educational assistance grant not to exceed five hundred dollars ($500.00) per academic year to qualifying members of the North Carolina national guard. Benefits shall be payable for a period of one academic year at a time, renewable at the option of the Secretary for a maximum of two thousand dollars ($2,000). (1975, c. 917, s. 5; 1977, c. 228, s. 2; 1983 (Reg. Sess., 1984), c. 1034, ss. 99, 100.)

§ 127A-194. Eligibility.

(a) Active members of the North Carolina national guard who are enrolled or who shall enroll in any business or trade school, private educational institution or State educational institution shall be eligible to apply for this tuition assistance benefit: Provided, that the applicant has a minimum obligation of two years remaining as a member of the national guard from the end of the academic period for which tuition assistance is provided or that the applicant commit himself or herself to extended membership for at least two additional years from the end of said academic period.

(b) This tuition assistance benefit shall be applicable to students in the following categories:

(1) Students seeking to achieve completion of their secondary school education at a community college or technical institute.

(2) Students seeking trade or vocational training or education.

(3) Students seeking to achieve a two-year associate degree.

(4) Students seeking to achieve a four-year baccalaureate degree.

(5) Students seeking to achieve a graduate degree. (1975, c. 917, s. 6; 1977, c. 288, ss. 3, 4.)

§ 105-134.6. Adjustments to taxable income.

(b) Deductions. - The following deductions from taxable income shall be made in calculating North Carolina taxable income, to the extent each item is included in gross income:

(4) Any amount not to exceed one thousand five hundred dollars ($1,500) received by the taxpayer during the taxable years as compensation for the performance of duties as a member of the North Carolina organized militia, the national guard as defined in G.S. 127A-3.

§ 105-151.20. Credit for tax paid on certain government retirement benefits.

A taxpayer who received government retirement benefits during the 1988 tax year may claim a credit against the tax imposed by this Division equal to the amount by which the tax under this Division paid by the taxpayer for the 1988 tax year would have been reduced if none of the taxpayer's government retirement benefits had been included in the taxpayer's taxable income. If a taxpayer received a refund of any tax paid under this Division on government retirement benefits for the 1988 tax year, the amount of the refund reduces the amount of the credit allowed under this section.

As used in this section, the term "government retirement benefits" means retirement benefits received from one or more state, local, or federal government retirement plans. As used in this section, the term "1988 tax year" means the taxpayer's taxable year beginning on a day in 1988.

The credit allowed under this section shall be taken in equal installments over the taxpayer's first three taxable years beginning on or after January 1, 1990. The credit allowed under this section may not exceed the amount of the tax imposed by this Division reduced by the sum of all credits allowed against the tax, except payments of tax made by or on behalf of the taxpayer. (1989 Reg. Sess., 1990), c. 984, s. 6; 1991, c. 45, s. 11).

§ 105-266.1. Refunds of overpayment of taxes.

(a) Any taxpayer may apply to the Secretary of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for the filing of the return or application for a license or within six months from the date of payment of such tax or additional tax, whichever is later. The Secretary shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The Secretary shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due: except that there shall be no refund to the taxpayer of any sum set off under the provisions of Chapter 105A, the Setoff Debt Collection Act.

(b) The rules of evidence do not apply in a hearing before the Secretary of Revenue under this section. G.S. 105-241.2, 105-241.3, and 105-241.4 apply to a tax or additional tax assessed under this section.

(c) Within 90 days after notification of the Secretary's decision with respect to a demand for refund of any tax or additional tax under this section any taxpayer aggrieved thereby, in lieu of petitioning for administrative review by the Tax Review Board under G.S. 105-241.1, may bring a civil action against the Secretary of Revenue for recovery of the alleged overpayment in the Superior Court of Wake County, or in the superior court of the county in which the taxpayer resides, if the alleged overpayment exceeds two hundred dollars ($200.00), and if two hundred dollars ($200.00) or less, in any State court of competent jurisdiction in Wake County. If upon trial it shall be determined that there has been an overpayment of tax or additional tax, judgment shall be rendered thereof, with interest, and the same shall be refunded by the State.

(d) Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the Secretary, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.

(e) Nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2, and, with respect to tax paid to the Secretary of Revenue, the rights granted by this section are in addition to the rights provided by G.S. 105-267. (1957, c. 1340, s. 10; 1969, c. 44, s. 66; c. 1132, s. 2; 1973, c. 476, s. 193; 1979, c. 801, s. 91; 1981 (Reg. Sess., 1982), c. 1211, s. 2; 1987, c. 827, s. 22.)

§ 105-267. Taxes to be paid; suits for recovery of taxes.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within 30 days after payment, the taxpayer may demand a refund of the tax paid in writing from the Secretary of Revenue and if the same shall not be refunded within 90 days thereafter, may sue the Secretary of Revenue in the courts of the State for the amount so demanded. Such suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it shall be determined that such a tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of taxes for which judgment shall be rendered in such action shall be refunded by the State; provided, nothing in this section shall be construed to conflict with or supersede the

provisions of G.S. 105-241.2. (1939, c. 158, s. 936; 1955, c. 1350, s. 15; 1957, c. 1340, s. 10; 1977, c. 946, s. 1.)

1957 Session Laws Chapter 1340

Subsection (h1). Paragraph numbered (1) of Section 105.241.3 of the General Statutes is hereby amended by deleting from the second line of the paragraph the words "without prior payment of the tax" and by inserting in lieu thereof the following:

""upon payment of the tax, penalties and interest asserted to be due or upon filing with the Commissioner a bond in such form as the Commissioner may prescribe in the amount of said taxes, penalties and interest conditioned on payment of any liability found to be due on an appeal"."

Subsection (i). G.S. 105-241.4 is hereby amended by deleting from the caption thereof the words "under protest" and by deleting from the first paragraph thereof the words "under protest" wherever they appear after the words "may pay the tax."

Subsection (j). Subsection 3 of G.S. 105-242 is hereby amended by deleting the words "subsection (3)" in line one of the second paragraph thereof and by inserting in lieu thereof the words "subsection (5)."

Subsection (k). Article 9 of Chapter 105 of the General Statutes is hereby amended by inserting a new Section therein immediately following G.S. 105-266, to be designated as G.S. 105.266.1, and to read as follows:

"G.S. 105.266.1. Refunds of overpayment of taxes.
1. Any taxpayer may apply to the Commissioner of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for the filing of the return or application for a license or within six months from the date of payment of such tax or additional tax, whichever is later. The Commissioner shall grant a hearing thereon, and if upon such

hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax fund by him to be due.

"2. The provisions of G.S. 105.241.1, G.S. 105-241.2, G.S. 105-241.3 and G.S. 105-241.4 with respect to review and appeal shall apply to the tax for which refund is demanded under this Section.

"3. Within ninety days after notification of the Commissioner's decision with respect to a demand for refund of any tax or additional tax under this Section any taxpayer aggrieved thereby, in lieu of petitioning for administrative review by the Tax Review Board under G.S. 105-241.1, may bring a civil action against the Commissioner of Revenue for recovery of the alleged overpayment in the Superior Court of Wake County, or in the Superior Court of the county in which the taxpayer resides, if the alleged overpayment exceeds $200.00, and if $200.00 or less, in any State court of competent jurisdiction in Wake County. If upon trial it shall be determined that there has been any overpayment of tax or additional tax, judgment shall be rendered therefor, with interest, and the same shall be refunded by the State.

"4. Either party may appeal to the Supreme Court from the judgment of the Superior Court under the rules and regulations prescribed by law for appeals, except that the Commissioner, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.

"5. Nothing in this Section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2, and, with respect to tax paid to the Commissioner of Revenue, the rights granted by this Section are in addition to the rights provided by G.S. 105-267."

Subsection 1. G.S. 105-267 is hereby amended by deleting the second and third sentences thereof and by inserting in lieu of the deleted portion the following:

"Whenever a person shall have a valid defense to the enforcement of the collection of a tax assessed or charged against him or his property, such person shall pay such tax to the proper officer, and such payment shall be without prejudice to any defense of rights he may have in the premises. At any time within thirty days after payment, the taxpayer may demand a refund of the tax paid in writing from the Commissioner of Revenue of the State, if a State tax, or if a county, city or town tax, from the treasurer thereof for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, may sue the Commissioner of Revenue or the county, city or town, as the case may be, in the courts of the State for the amount so demanded."

Dated: February 6, 1957.

CHAPTER 1002
SENATE BILL 1084

AN ACT TO CONFORM THE LAWS OF NORTH CAROLINA TO THE REQUIREMENTS OF CERTAIN FEDERAL LAWS AND CONSTITUTIONAL PRINCIPLES.

The General Assembly of North Carolina enacts:

Section 1. G.S. 105-115 is repealed.

Sec. 2. G.S. 105-134.6(b)(4) is repealed.

Sec. 3. This act is effective for taxable years beginning on or after January 1, 1990.

In the General Assembly read three times and ratified this the 20th day of July, 1990.

/s/James C. Gardner
James C. Gardner
President of the Senate

/s/J.L. Mavretic
J. L. Mavretic
Speaker of the House of Representatives